

IN THE

**United States Circuit Court of Appeals****For the Ninth Circuit**

THE AMERICAN SCHOONER "HALCYON," her tackle,  
 apparel, machinery, boats, furniture, appurte-  
 nances, cargo and freight money, and  
 J. A. T. OLSON, master and claimant,

*Appellants,*

VS.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIM-  
 ITED, a Hawaiian corporation, owner of the  
 Steamer "Niihau," for itself, the officers and  
 crew of said steamer and other servants of  
 said owner,

*Appellee.***BRIEF FOR APPELLEE.**

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*Of Counsel.**Filed*Filed this 22 day of October, 1916.*F. D. Monckton* FRANK D. MONCKTON, Clerk.

By \_\_\_\_\_ Deputy Clerk.



No. 2830

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## BRIEF FOR APPELLEE

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Appellee's brief in this case has been prepared, as is natural, by its counsel in Honolulu without the benefit of an inspection of the brief of opposing counsel. Owing to this fact, and because of this court's unfamiliarity with the locality of the salvage operations, it has seemed wise to said counsel to treat the matters involved very fully and, as far as possible, to anticipate

and meet appellant's contentions. It is to be hoped also that this method of procedure will, by its comprehensive reference to and summary of the testimony of both sides on the various points involved, relieve the court of much of the labor incident to reading and digesting the rather lengthy record. The facts are detailed with great care in the body of the brief, while at the end thereof, under the heading of "Amount of Award", said facts are stated more generally so as to give the court a clear and compact understanding of the very meritorious salvage service which was performed. A brief addendum to the brief will also be furnished by appellee's local counsel in San Francisco dealing with such points in appellant's brief as seem to require further treatment.

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### Opening Statement.

The schooner "Haleyon" arrived at Hilo, Hawaii, on January 9, 1914 (Tr. 72; 90, 119), with a cargo of lumber, and was taken to the "railroad wharf" in Hilo Bay where she discharged a part of her deck load, and by the evening of January 12th had discharged about 50,000 feet of lumber out of her full cargo of about 130,764 feet. These figures seemingly do not appear so completely in the record (Tr. 265, 436), but they are from the memorandum agreed upon between counsel in the case which was the basis of the admissions as to values of the cargo, vessel and freight money (Tr. 196), and we assume without question that libellee's counsel will approve this statement.

On the evening of January 12th the schooner lay a little off from the Hilo side of the railroad wharf (Tr. 27, 38-39, 72, 74, 95, 119-120), with head and stern lines running to the wharf on her starboard side (Tr. 27, 38-39, 72, 95, 104, 119-120), and head and stern breast or mooring lines to the first and second buoys from land (Tr. 38-39, 119-120, 135), on her port side (Tr. 27, 72, 74, 95, 119-120, 182). These lines will later be more particularly described, and reference will be made also to the breast lines between the vessel and the wharf. The positions of the buoys are shown on the sketch made by Bruhn (Tr. 182) in evidence as libellant's Exhibit "B" (see Tr. 484).

The small schooner "Ka' Moi" was also similarly moored about 40 or 50 feet astern of the "Halcyon", both vessels heading with bows offshore (Tr. 40, 47, 73).

During that day the weather "was looking kind of bad" (Tr. 27), and the storm increased as the evening advanced. Its direction, both as to wind and sea, was approximately from north to south and in practically a direct line with the line of the railroad wharf (Tr. 70, 77-78, 83-84, (183 map), 106). The "Halcyon" broke loose from the wharf between nine and ten o'clock that evening (Tr. 27, 41, 73, 91, 95-96), and began drifting astern with the wind and sea (Tr. 73, 152-153) toward the "Ka Moi". An anchor was dropped in an effort to hold her (Tr. 27, 41, 73, 91, 95-96, 120), but this failed and she drifted back with her stern into the bow of the "Ka Moi" (Tr. 27, 47, 120, 104-105). By slipping off the stern line to the wharf (Tr. 135) and hauling upon the after breast line to the farthest

inshore buoy the "Halcyon" was hove clear of the "Ka Moi" (Tr. 27, 47, 73-74, 96, 105, 120, 135, 81), and then her master, Capt. Olson, dropped her other anchor (Tr. 41-42, 53, 73, 75, 86), and relied upon the two anchors and the breast line to the inner buoy to hold them (Tr. 97, 135). For a time these seemed to hold her (Tr. 120), maybe drifting a little (Tr. 28), but "then the wind blew that time" (Tr. 28), and toward two or three o'clock in the morning she began to drift in again, and "kept working" (Tr. 28-29, 41, 44-45, 75, 120), moving toward the piles at the mouth of the Waiakea River (Tr. 46, 75, 92).

Signal lights or flashes were made by the schooner (Tr. 33, 76, 84, 107-108), but these were apparently unobserved by anyone (Tr. 122, 213, 298, 314).

The distance which the schooner drifted in this direction and her position are matters somewhat in dispute, and will therefore be left for discussion as part of our argument.

One of the "Nihau's" boats, proceeding out of Waiakea River to join the steamer, at about 3:30 or 4:00 o'clock in the morning (Tr. 196, 221-222, 296, 307, 474), passed fairly close to the schooner (Tr. 91-92, 296) and was hailed for help by her (Tr. 109, 122, 296-297, 304, 335). Help was promised (Tr. 297), and the boat proceeded to the steamer to report the matter, and the "Niihau" promptly proceeded to render assistance, as will be described in our argument.

The work of the steamer, summed up in a few words, amounted to sending a line to the vessel in distress, in the darkness of night and in a storm, and towing her

out to deep water in the harbor, but the operation was interrupted by the parting of the hawser. Capt. Bruhn, of the "Niihau", believed at the time that his line had been cut by those on the schooner, and testified that when it occurred he saw a man on the after deck of the schooner, whom he took to be her captain, make a sweeping motion with his hands which Bruhn, interpreted to mean that they were satisfied, and this was immediately followed by the dropping of the schooner's anchor. The steamer, being unable to lay in such close proximity to the schooner, steamed a little further ahead and itself dropped anchor.

Libellee claims that Bruhn knowingly allowed the schooner to drift again, and did not move promptly to her relief.

The libellant claims precisely the opposite, and that, as soon as it was clear that the schooner was drifting and could not hold herself, Bruhn proceeded at once to assist her the second time, and did so without any request or signal from the schooner. The work of the steamer had been going on for a considerable time before the signals were finally put up.

Leaving the argument as to the facts to be presently made, we state further here that the drift of the schooner continued in the direction of the wind and sea, moving more rapidly as she neared the shallower water, the direction having been approximately toward an old boiler of the wrecked "Kilauea-hou" lying on the water's edge about in a line directly south of the outer end of the railroad wharf, as shown approximately on the map in evidence as libellee's Exhibit 1,



referred to on Transcript pages 202 and 206. That she passed outside of the piles this time was doubtless due to the fact that she had been brought by the steamer to a position further out from the west side of the railroad wharf.

The steamer again picked up anchors and circled to a position farther in toward the beach, dropped anchors and swung to them, and, after paying out chain, again despatched her small boat, held by a surf line from the steamer, and a heaving line was thrown on board the schooner, by means of which the hawser was taken on board. The hawser was immediately made fast, and drawn taut by the steamer heaving on its anchor chains, by which means the schooner was drawn around into line again with the steamer and the direction of the elements, and then the steamer held her thus while a second line was sent to supplement the first. By further heaving and steaming, the schooner was gradually worked free and towed out into the harbor again, where, at the request of the master of the schooner, to which was added that of Pilot Mosher, the steamer lay to and held the schooner by two lines all the rest of that day and throughout the following night; and on the following morning, when the storm had abated, the lines were cast off and the steamer went about her own business.

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#### CLAIMS OF THE LIBELLANT.

The libellant submits that the schooner and cargo were in imminent and extreme danger on two occasions in the storm which prevailed during the operations of



rescue, and that, had the "Niihau" not in each instance have gone to her assistance and brought her out of her perilous positions, she would have been wrecked and lost, doubtless with all or most of her cargo as well; also that considerable danger was incurred both as to the steamer and the men who manned the small boat which took the lines to the distressed vessel. On the other hand we have the libellee urging before the court that the services rendered were small and slight, not amounting to more than a towage service on either occasion, and that at no time was the schooner in any immediate danger; that the weather, wind and sea were not so bad as might have been, and, generally speaking, that no special merit was shown entitling the libellant to more than towage compensation. It is even claimed, in the answer of the claimant on file, that whatever danger the schooner did in fact get into, at least on the second occasion, was due to the negligence and "nonchalant" conduct of the libellant's servants, and that, even if the second rescue was in fact a real rescue of the schooner from danger it was from a danger into which she had fallen because of sheer neglect by the "Niihau". The claims of the libellant, as to the elements in the present case which ought to have their part in the consideration of salvage awards, are, we submit, substantiated by the following facts and argument.

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### Argument.

When word was brought to the steamer of the schooner's trouble, the steamer was lying pretty well

out into the bay (Tr. 214, 307, 335, 385) at her usual anchorage off the end of the railroad wharf (Tr. 197, 214; and see N-1 as marked by Carlson on libellee's Exhibit 1).

Immediately upon being notified of the trouble, Bruhn gave orders to the engineer to get ready to move, and was informed in reply that she was ready (Tr. 197, 335, 474). The small boat had left the Waiakea boat landing at about 3:30 o'clock that morning (Tr. 221-222, 296), and by the time it had come out of Waiakea River and held communication with the schooner and then reached the steamer it was about 4:00 o'clock (Tr. 221-222, 474).

Capt. Bruhn was informed that the schooner was ashore (Tr. 214, 221-222, 297, 307, 335, 474) "off the mouth of Waiakea River" (Tr. 196, 335, 474) and although the libellee denies that the schooner was in fact ashore, the fact remains that Bruhn was by such information called upon to plan his operations to deal with the schooner as being ashore at the mouth of Waiakea River. This required that he should place his own vessel in the best position to approach the mouth of Waiakea River with the line to be sent. He had first to pick up his two anchors (Tr. 197, 214, 335), and then steam over towards and a little to the Hilo side of the end of the railroad wharf (Tr. 51, 110, 197, 215, 307, 335, 336), at which point he dropped both his anchors (Tr. 51, 88, 109, 110, 197, 335-337, 362; and see libellant's Exhibit B), placing them separately and sufficiently apart to make them serviceable for the heaving expected to be done. When so placed the anchors lay between the end of the railroad wharf and

buoy No. 3 counting from the shore (see Tr. 197, 335, and Bruhn's sketch, libellant's Exhibit B). The steamer then swung around to her anchors, and when in line with the wind and sea, paid out chain (Tr. 51, 110, 111, 146-147, 197), about 90 fathoms to each anchor (Tr. 197, 307, 335), and she was thus allowed to drift down stern first before the wind and sea toward the location of the schooner (Tr. 51, 111, 214, 307, 335). Bruhn said that this finally brought the steamer close to the second buoy (Tr. 384); this was perhaps about 600 feet from the schooner (Tr. 213).

Meanwhile, on board the steamer they were breaking out a new coil of 4-inch line, to be used as a surf line in sending a boat to carry a new 6-inch line (Tr. 71, 308, 338) also prepared to be used as a hawser for the pulling (Tr. 305-306, 338), and the same boat which had brought the purser out was used to take the line (Tr. 197-198). The method of operation was as follows: The 4-inch line was bent on to the 6-inch line, and the entire 6-inch line then coiled in the boat (Tr. 197-198, 218, 305-306, 338), and on top of it was coiled the 4-inch line, one end of which was made fast to the steamer (Tr. 305-306, 338). By slacking away on the 4-inch line in the small boat and also pulling on the oars, the boat was carried down backwards toward the schooner (Tr. 198, 206-207, 306), and when the schooner was reached one end of the 6-inch line was passed on board (Tr. 51, 76, 198, 206-207, 338), where it was made fast to the foremast (Tr. 76, 100, 123), and then the 4-inch line, having been attached to the steamer's windlass (Tr. 198, 217-218), was heaved in by the steamer to bring the 6-inch line and boat back (Tr. 198, 218, 306). When

the boat had gotten back and the 4-inch line all taken in by the windlass, the end of the 6-inch line came on board and there was just enough of it to make it fast to the steamer's bitt (Tr. 218-219, 306). This done, the steamer began heaving on her anchors to make the line taut. The 6-inch line was 120 fathoms long (Tr. 218, 308, 338), but, when the slack had been taken in and it became taut, the distance between the two vessels was about 60 or 65 fathoms (Tr. 50, 309, 339, 384).

All of the foregoing was accomplished in about one-half to three-quarters of an hour (Tr. 101, 305, 476), as the steamer began heaving on her anchor chains at about 4:30 o'clock that morning (Tr. 474, 475, 476, 477, 481).

It will be noticed, in passing, that the schooner's mate, Joseph, said that the steamer heaved on the schooner for about an hour before she started towing (Tr. 77). Bruhn said "We hove on that line and brought her up gradually", and "*then*, when we went ahead with her, got it all taut and *started up* with her, hove *in* on our anchor chains the same as I explained to you" (Tr. 382-383). This is significant as respects the question whether or not the schooner was actually ashore or on the bottom at the time,—an issue which we will presently discuss.

When the actual towing out began, the schooner hove in on her own anchors to pick them up (Tr. 31, 44, 76, 92-93, 102, 114, 123, 143), and raised the starboard anchor but lost the port anchor altogether (Tr. 42, 57, 76, 93, 100, 102, 123, 143, 164); and as the schooner gradually moved out, increasing her distance from the in-

shore buoy to which her line was fast, paid out her line to the buoy to its full length and then had to let it go (Tr. 93, 101-102, 123-124).

The steamer gradually worked out with the schooner (Tr. 77, 198-200, 251, 259-260), and the slow work in the teeth of the driving storm was still in progress when the schooner had reached a point about westerly of the end of the railroad wharf (Tr. 50, 51, 54, 151, 199, 219, 316, 333, 340), where the line parted (Tr. 31, 32, 48, 93, 102-103, 151-152, 340, 475, 477) after a tow of some 600 or 800 feet in all to that point (Tr. 77, 81, 103, 125, 142, 219). This occurred between 6:30 and 7:00 o'clock (Tr. 86, 93, 222, 312-313),—nearer 7:00 (Tr. 93, 251, 474, 475, 476, 477),—that is, from two to two and one-half hours for a tow not exceeding 800 feet.

The cause of the line thus parting was not then known to those on board the steamer, and Bruhn thought it had been cut on board the schooner (Tr. 225, 340, 374-375, 413), although it was afterwards ascertained that it had gotten foul of one of the buoys and been cut on it (Tr. 251, 278-279, 340, 374).

Immediately upon the parting of the line the schooner dropped her remaining anchor (Tr. 32, 53, 77, 93, 125, 142, 199, 314, 340, 342), whereupon the steamer, being relieved of the tow and being under necessity of coming to a stand herself, steamed a little further ahead and dropped her own anchors (Tr. 199-200, 223, 263, 342). This point was near the end of the railroad wharf (Tr. 271).

We desire here to go back a little, and deal with the issue of the actual position and danger the schooner

was in when the line was first sent on board early that morning. The libellee makes all possible claims which would tend to minimize the danger, and claims also that the schooner was neither ashore nor in any particular or immediate danger at the time. That the weather was "not so bad", and that seas have been "worse".

In support of the libellant's claims as to the position and circumstances of the schooner when help was first rendered as stated, we refer to the following:

Witnesses for the libellee variously estimate the distance the schooner drifted after she broke from the wharf. Sach said only about a hundred feet and a ship's length more (and the "Halcyon" was only about 130 feet long) until the steamer got a line on (Tr. 44-45); and this is interesting as an estimate of distance when he also stated a little later that she was "a ship's length, about two hundred feet" *from the piles* (Tr. 45). Joseph said the drift was "from that wharf probably six hundred feet",—meaning to the place where she lay *until* 3 o'clock (Tr. 74),—and we note that he did not say from the *end* of the wharf,—so that the presumption is that he meant from where she was lying before she broke loose. In that case she was 600 feet from the wharf toward the piles or toward the old Hackfeld wharf, and 600 feet in either of those directions would have found that schooner not far from where libellant claims she was. Then, if we add Pier-sen's statement to that of Joseph, that *after that* (from the 3 o'clock location where she was hanging to the buoy) she drifted about 200 feet (Tr. 92), we have it about 800 feet in all.



The course of the purser's boat, coming out of Waiakea River early that morning, took it east of the piles which project beyond the Hilo side of the river mouth (Tr. 204, and see map), and Morton said he saw the schooner "as soon as we got *to the mouth of Waiakea River*" (Tr. 296, 214). This was pretty close, as otherwise it would not have been seen so soon, as it was a dark night (Tr. 109, 214, 216, 303, 307, 308, 311, 326, 476). Being seen, the schooner was hailed, and the small boat passed close enough for words to be shouted and heard in the storm which was prevailing.

That there *was* a storm prevailing, not only from early the evening before, but continuing and increasing through that night and the following day, is clear from the following references:

The direction of the wind was approximately in the line of the railroad wharf, from a little east of north (Tr. 70, 77-78, 83-84, 106, 132, 137, 211, 244, 294, 317, 364) and the sea was running in the same direction (Tr. 60, 70, 78, 132, 211, 264; and see the arrows showing direction of wind and sea on libellee's Exhibit A, referred to in Tr. 84).

It was a strong and heavy wind (Tr. 210-211, 280, 294, 317, 467), blowing high (Tr. 244); a heavy gale (Tr. 316, 323, 364); pretty nasty winds blowing, *the strongest we ever had in Hilo* (Tr. 253); very nasty weather (Tr. 344-345).

Its velocity was variously estimated by witnesses as follows:



Carlson, 40 or 50 miles an hour (Tr. 211);

Lacerdo, 25 miles (Tr. 253) or more (Tr. 274);

Filler, 30 miles (Tr. 294);

Thompson, 35 to 40 miles (Tr. 323);

Mosher, 40 and probably more (Tr. 345);

Bruhn, 40 to 50 miles (Tr. 364);

Olson, 40 miles (Tr. 167).

The boat's crew refused to go again to take soundings unless the boat were held by a surf line (Tr. 309).

Through the night and morning and all of the following day the storm increased (Tr. 36, 77, 132-133, 211, 331), but quieted during the following night (Tr. 211, 376).

The sea was heavy, and a heavy swell was running (Tr. 70, 106, 211, 214, 244, 294, 323, 332, 344-345, 380, 426, 467). A heavy, dirty sea running (Tr. 323, 364); big waves (Tr. 281); very squally (Tr. 226-227, 323). There were breakers in the bay (Tr. 211); waves 4 or 5 feet high (Tr. 258, 278, 426); 6 feet high (Tr. 364); 6 or 8 feet high (Tr. 351-352). Swells that lifted Mosher's launch up and down 8 or 9 feet (Tr. 352). Some of the breakers "went clear over the schooner and over her deckload" (Tr. 211-212, 319, 372-373), with the "Halcyon" at H-2 as marked by Carlson (Tr. 212) on libellee's Exhibit 1 (see Tr. 205). There were 5 or 6 breakers between her and the shore (Tr. 211, 218). Waves were washing high on the beach (Tr. 284); and "you've got to have a heavy gale to make any breaker on the beach at all" (Tr. 352). Mosher had to go on

board the schooner on the starboard side because to have gone astern of her he would have gotten into the breakers (Tr. 357).

Even the libellee's witnesses had to make some admissions: It took them half an hour that night to run the schooner's line to the buoy, and they "had to pull" to get to the buoy (Tr. 106); it was "pretty heavy" (Tr. 106). "It was kind of tough getting alongside that buoy" (Tr. 43). When the line was sent the second time the boat simply paid out the surf line and was carried by the drift to the schooner (Tr. 79). Sach was uncertain whether after the second tow out the steamer was "afraid to hold us" (Tr. 62). That it was "kind of rough" (Tr. 36). Duvel, a witness for libellee, said "*the roughest sea in the harbor, in fact, I have noticed since I came here*" (Tr. 447). Olson was afraid the schooner's anchor chain would carry away even after being towed out the second time (Tr. 209, 374).

Olson, who said the weather was "not very bad" (Tr. 132), and as to the wind that he had "seen it worse" (Tr. 167), was in trouble when, on cross-examination, he had to admit that it blew 40 miles an hour (Tr. 167); and, finally, to admit that he had not left his schooner all that day or the following night because the weather was too rough for it to be safe (Tr. 168-170); and, while he tried to intimate that he had wanted to stay on board that day so as to be in charge of his vessel because he was "doubtful about the weather" (Tr. 170), he could not, when pressed, give an answer to the question whether he had not said

to Mr. Nichols that he had failed to come ashore within 24 hours to note a marine protest because he could not safely have done so (Tr. 170).

The purser in the small boat had a considerably better opportunity to judge the approximate distance the schooner was from the piles, as he had just traversed that distance to talk to her, and we submit that his judgment upon it is more reliable than that of one on board the schooner who had *not* traversed that distance. It will be remembered that the boat was proceeding against a head wind and sea as described, and it follows that its progress could not have been very rapid,—a fact which would ordinarily tend to influence the judgment of its occupants that they were a long time reaching the schooner, while, in fact, Morton thought it strange to find her so *close* in (Tr. 304).

The course of the small boat was such that, after it passed the schooner, it came up abreast of the “Ka Moi”, still lying alongside the wharf (Tr. 296). There is no evidence of any moon or starlight, or other lights around, even on the schooner (Tr. 337), except a light away aft in the cabin (Tr. 298), or the wharf (Tr. 385).

Purser Morton said they tried to get as close as they could to the schooner to see what was wanted (Tr. 297), and he said twice that someone on board told him at the time that the schooner *was ashore* and wanted a line (Tr. 196, 297, 304). Morton indicated the approximate position of the schooner by the black dot marked HPM which he placed on the map in evidence as libellant’s Exhibit A, located near the end of the piles at

the mouth of Waiakea River, but, not having attempted to place this dot according to scale (Tr. 299), he independently described it as being about 50 feet *off* the piles (Tr. 298, 299), and from 150 to 200 feet off and abreast of the old "Hackfeld wharf" (Tr. 299). But the night was dark and, not having paid particular attention to relative distances, he could only give his best judgment. He meant 50 feet east of, let us say, the north and south line of the piles, but 100 feet say N. E., from them in the direction of the old Hackfeld wharf (Tr. 299-301), and he drew a rough sketch to show the relative position from the piles and the Hackfeld wharf (Tr. 299-301; and see libellant's Exhibit A).

The loaded draft of the schooner, so far as the record shows, depending entirely upon the testimony of libellee's witness, "couldn't be *more* than fourteen feet of water" (Tr. 46). This may be taken as meaning an admission of possibly as much as 14 feet. In Bruhn's opinion the schooner was touching in  $2\frac{1}{2}$  fathoms of water (Tr. 381-382) the first time she drifted in.

No soundings were taken by the schooner in the vicinity of Waiakea River mouth (Tr. 44), but soundings were taken by the steamer, for which purpose the small boat, after having first taken the line to the schooner, was sent back by Capt. Bruhn in charge of the first mate as soon as the boat had returned from bringing the line (Tr. 309-310, 325-326), and the line was made fast (Tr. 325-326). This boat proceeded in the direction of the mouth of Waiakea River (Tr. 310). On account of the rough condition of the sea and the fact

that the small boat had to be held and controlled by a surf line held by the steamer to keep it with head to the sea for safety (Tr. 310, 326), this small boat could not go around the schooner, but took soundings off the schooner's starboard bow and about opposite her mizzenmast, and found about 3 fathoms of water at her bow and  $2\frac{1}{2}$  about amidships (Tr. 310, 326, 381), as best could be determined with the "sea running and boat shaking up and down" (Tr. 310). This boat got into the breakers in taking these soundings (Tr. 310, 352). Bruhn's idea in taking soundings was to find if there was any obstruction before he began to tow (Tr. 382), as the bottom there is rocky (Tr. 383).

Other evidence as to the schooner's location, compared with the piles at the mouth of Waiakea River, the old Hackfeld wharf, etc., is as follows:

The scale on the map of Hilo Bay is 1-10,000. Hence 1 inch equals 833 feet. By this scale it is clear that the distance from the extreme outer end of the railroad wharf to the outer end of the piles at the mouth of Waiakea River is just about 1358 feet.

As already indicated in the early part of this brief, the "Niihau" had dropped her anchors between the end of the railroad wharf and the outer buoy, and let out 90 fathoms of chain on her anchors,—say 530 feet, allowing for any slack. When she had sent her line to the schooner and hove it taut the distance between the two vessels was about 60 or 65 fathoms (Tr. 50, 309, 339, 384),—say another 390 feet. Add the length of the "Niihau", say 150 feet (Tr. 414), and that of the schooner, say 130 feet (Tr. 45, 166), and we have a whole

total of about 1200 feet from the "Niihau's" anchors to the *stern* of the schooner (Tr. 384, 390-391). The difference between the distance from the extreme end of the wharf to the piles, 1358 feet, and the total of the chain, line and vessels, 1200 feet, leaves 158 feet which there might have been between the schooner's stern and the end of the piles had she been right in that line. As it was she was a little to the wharf side of the piles, more nearly off the mouth of Waiakea River, and it is very clear from the map, which also shows the depths of the water in feet, that at any such distance toward Waiakea River or toward the old Hackfeld wharf there was not more than 12½ feet of water. With her draft "not more than 14 feet" (Tr. 46), which, we submit, coming as it does from the libellee's own witness and to be taken as most favorable to the libellee, means a possible (and therefore probable) draft of 14 feet, that schooner *was* pretty hard aground. It is not inapt at this point to mention that Bruhn's estimates of distances in the instances where he gave any estimate of distance, may be given pretty fair acceptance judging from his estimate that the railroad wharf was about 800 feet long. By the scale on this map it is just about 820 or 825 feet long. Another point: If, as claimed by the libellee, the schooner was not so far down toward the mouth of Waiakea River, but nearer the railroad wharf, then, if we turn the line of 1200 feet to her stern measured from the steamer's anchors to any point nearer the wharf than the end of the piles, she would have her stern pretty close to the rocky edge along the old Hackfeld wharf, and with a depth of water, if she drew a



full 14 feet, not enough to keep her off the bottom with the seas that were coming in to lift and lower her. Purser Morton said that when he saw her she was rolling (Tr. 304). A vessel does not *roll* materially when riding to her anchor, however much she may pitch. We submit that she *was* on the bottom, and that those on board the schooner told the purser the truth when they said that she was ashore.

The witness Carlson endeavored to mark the schooner's position on the map, libellee's Exhibit 1 (Tr. 202-203), but said it was hard to do. It shows a line toward the piles off the "breakwater" (meaning the line of piles) at Waiakea River. This witness could not assume to state the distance of the schooner from the piles, as he says it was too dark to see it,—and it is here noted that he was on the steamer and was judging by the direction of the steamer and the approximate distance from her anchors. He had not passed over the intervening distance between the piles and the schooner, as had Morton in coming out of Waiakea River, so that his reason for not knowing was a good one. He nevertheless knew that she was "inside of the schooner 'Ka Moi'",—i. e., closer to shore (toward the piles) than the "Ka Moi", and that the "Ka Moi" was off the "entrance" or shore end of the railroad wharf (Tr. 214).

We here wish to call attention to a continuous error in the *depositions* where the reporter has written the word "boulders" and/or "boilers", instead of the word "piles",—the reference of the witnesses being to the



*piles* at the mouth of Waiakea River (see pages 45, 46, 92).

Capt. Bruhn's sketch (libellant's Exhibit B) shows also his conception of the approximate positions of the piles and the old Hackfeld wharf (Tr. 336-337), and he also marked the schooner's position as best he could (WCB on libellee's Exhibit 2, Tr. 390). In Bruhn's judgment the schooner "must have touched the way she was lying" (Tr. 381). He saw the sea "raising her up and down" (Tr. 383).

In taking soundings as stated, the second mate's small boat got into the breakers (Tr. 310, 332).

The libellee's own witness, Sach, *on board* the schooner, did not believe that the schooner was "very far off",—a ship's length, perhaps two hundred feet, from the row of piles (not boulders),—and he sketched her position on the map (Tr. 45-47). If by a ship's length he meant his own vessel, which we think would have been natural, he would have about 130 feet in mind,—which is not far from the difference between the 1358 and the 1200 feet before mentioned.

Libellee's own witness, Clover, said the stern of the schooner was about 150 feet or 200 feet from the piles and the same from the rocks (Tr. 111-112),—another close figure (at 158 feet) by a similar comparison.

Libellee's witness Piersen said she "ran over the side towards them boilers" (meaning piles) (Tr. 92). Clover said "we had them (the piles) a little bit on the port quarter. I believe if she would have drifted in over there she would have drifted into the creek there" (Tr. 111).

Capt. Olson said it was about 600 feet from the piles and the same distance from the wharf (Tr. 137). He did not say from what part of the wharf, and, as he had drifted from the "Ka Moi", which was moored close to the shore end of the wharf, the scale on the map will show that 600 feet from the *shore* end of the wharf would land him either against the piles or else inside of them right up in the mouth of the river. He could not have been, and he was not, any 600 feet from the piles and the wharf both.

Sach's statement, made as of the time when she had been drifting and her *second* anchor had been dropped, was that the anchor had only 6 or 7 fathoms of chain, and if more was paid out it went slack (Tr. 43-44). From this it is quite clear that her drifting had then *stopped*, and as nothing up until then had *held* her, *she must have been stopped by the bottom*. That second anchor had been down for some time before the steamer took hold. Sach's attempted explanation that this was caused by the steamer's pulling (Tr. 44) is not consistent with any common sense course, as they would not then have been *paying out* anchor chain but rather taking it in, nor is it consistent with his own statement that "we started heaving them up" (Tr. 44). Again we call attention to the testimony of the mate of the schooner that the steamer heaved for an hour before she towed (Tr. 77).

Olson himself even, with his usual indifference to facts, said he *let* this second anchor have "*less than fifteen*" fathoms of chain, and would not give it more because he did not want to go back too far (Tr. 138),—

plainly an indication that she was very "close" to the bottom or the rocks. Notice, too, that he said "*less than fifteen*" fathoms, but not *how much* less. We may therefore rely on Sach's statement that it wasn't over six or seven fathoms of chain given that anchor (Tr. 43-44). In other words, *when* Olson *dropped* that second anchor, he didn't dare let his vessel go back more than 6 or 7 fathoms further. 36 or 42 feet of anchor chain affords little hold. The other anchor had had about 30 fathoms of chain out (Tr. 40, 72), and *that* didn't hold her (Tr. 41-42), because it was after she began to drift again at about three o'clock that the second anchor was dropped (Tr. 41, 73, 91, 95-96, 120). The longer the anchor chain the better the hold, both because of distance affecting the hold on the bottom as well as the extra weight of the chain. Yet with both anchors down she was drifting again (Tr. 75).

One of libellee's witnesses said she drifted "a little", which "little" meant "about hundred or two hundred feet" (Tr. 30),—a real and substantial drift, with two anchors down.

That the schooner was really drifting, gradually if not always perceptibly all the time, is evident, we submit, from the whole situation. She had been lying off the wharf with head and stern lines to the wharf fore and aft, and with head and stern mooring or off-breast lines to the buoys fore and aft, and also had some breast lines to the wharf (Tr. 39, 104, 133-134). Olson tried to put these wharf breast lines out of the case by saying they were not tight but were slacked up, as they were only used in the daytime to hold the vessel close in to the

wharf for unloading (Tr. 134). But the fact is that they were on the vessel, and, although they may have been "slackened up over night" (Tr. 134) and may have been slack while the vessel was held by the other lines, those breast lines came into play when the other lines had broken. The head line, which broke first (Tr. 135), was a 9-inch line (Tr. 39, 135). The stern line to the wharf was also a 9-inch line (Tr. 72, 135). The mooring lines to the buoys fore and aft (Tr. 12, 38, 83) were 5-inch lines. The breast lines, slack perhaps until the other lines gave way, were also 5-inch lines (Tr. 134). The stern line to the wharf was purposely slipped to free the "Halcyon" from the "Ka Moi" (Tr. 135), but all the rest of the lines *broke*, sooner or later, under the stress of the storm, although the stern line to the buoy held longest. An added anchor failed to hold her (Tr. 29-30, 45, 75, 96). The forward breast line to the second buoy held for a time, but "parted in some weather (way)" (Tr. 136), and its parting made Olson run another line from the bow to the inshore (No. 1) buoy (Tr. 75, 130-131, 136), where the stern buoy mooring line was then still holding, which new line was a 6-inch line (Tr. 29, 75, 91, 96, 105, 136). Up to this point the schooner was not drifting altogether stern away from wind and sea but must have been moving more or less quartering before the wind and sea. When that forward breast line to the buoy broke Olson ran the new 6-inch line from her bow to the inner buoy. Until he got it run the dragging anchors must have served to hold her bow up to somewhat the same quartering position, but after the schooner's boat left to run the 6-inch line, and before the boat got to the buoy

with that line from the bow, the line from the *stern* to the same buoy broke (Tr. 75, 96, 120). When that stern line thus broke "of course, when that line snapped she threw her stern around over towards the mouth of Wainaku (meaning Waiakea) Creek. Then we got the second line (meaning the new 6-inch line from the bow). We got that to the buoy; then the vessel seemed to be in a dangerous place" (Tr. 75-76). Then the schooner had the one line from the bow and the two anchors (Tr. 97, 121). Olson then flared lights for help, but it does not appear that anyone saw the signals (Tr. 122, 213, 298, 314). Here we note that Clover said that this 6-inch line from the bow to the inner buoy, last run, was about 400 feet long, but that he had out only about one-fourth or one-half of it (Tr. 121). Upon his own testimony at its worst for the libellant, and best for the libellee, if that line was fast to the inner buoy (Tr. 74, 131-132, 136), and the wind was "strong north-east" and the swells "about the same" (Tr. 132), and that inner buoy not more than 400 feet (if that) from the shore (see Tr. 131) or rocks by the old Hackfeld wharf, and as his own vessel was 130 feet long, then if from a quarter to a half of that 400 feet of that 6-inch line were cut, the schooner *was ashore*, as the map and scale will show.

It was *immediately* after this 6-inch line had been made fast to the buoy and had just been hauled taut that the *steamer's* line came (Tr. 42, 43, 76, 97, 106), and there is even some evidence on the part of one of the schooner's boat crew (Clover) that the port anchor had already gone at the time of the boat's return to

the schooner (Tr. 96, 97, 105); to these facts, add that this port anchor was lost in trying to heave it in and take it up after the steamer had begun pulling on the tow-line (Tr. 31, 76, 77, 143, 164), and that the steamer began pulling on the tow-line at half-past four in the morning (Tr. 474, 475, 476, 477, 481), and we possess a most substantial showing that the schooner, up to that time had not *held* for any appreciable time by anything it had put out. Having broken all lines she had, dragged both anchors, and being only able to give out 6 or 7 fathoms of chain on the second anchor when that was put down, anything more *going slack*, we submit that the showing is clear that she had kept on drifting from the first, and was finally actually on the bottom,—because otherwise she could have taken more chain than 6 or 7 fathoms.

Paulos, the libellant's chief engineer, testified that the "Niihau" began to pull on the taut towing hawser at 4:30 a. m. and that the towing continued with his engines at full speed until "About six-fifty or seven o'clock the line parted" (Tr. 474, 476). The tow covered some 600 to 800 feet in distance (Tr. 77, 81, 103, 125, 142, 219), and the fact that it occupied from two to two and one-half hours strongly supports the testimony of libellee's witness Joseph, the schooner's mate, that the steamer heaved on the tow-line for probably an hour before she started towing (Tr. 77), and of Capt. Bruhn of the "Niihau" to the same effect (Tr. 382-383).

Even on libellee's own contention that she was not ashore, we submit that she was having an excellent



prospect of it in the next few minutes. Olson himself testified "*I drifted all the time until I got that line tied*" (Tr. 138), and the reference was to the 6-inch line run to the inner buoy, from the running of which his boat got back only just before the steamer's line was placed on board (Tr. 97), and until which time the anchors were not holding even if one of them wouldn't take more chain.

Here we will take up the libellee's claim that the schooner began drifting almost immediately after the line parted, and that Bruhn was negligent in that he did not immediately again send another line and keep on with his efforts to get the schooner further out, and, in any event, that he did not proceed promptly when it was or should have been manifest to him that the schooner was drifting again. Therefore it is urged that the second rescue had no merit to call for a salvage award because it was a peril for which the salvor was responsible.

The libellant maintains, on the other hand, that the schooner did not in fact begin drifting immediately, but lay there seemingly all right, for a time ranging, in the estimates of the different witnesses, from 15 or 20 minutes to an hour. Furthermore, there is evidence from libellee's own witnesses, which we will presently indicate, that she did in fact lie there for some time before she was known to be drifting. In any case we submit the showing is clear that when she *did* start drifting her movement was in line with that of the wind and sea, in which direction or line both vessels were lying to their anchors, one ahead of the other,



in consequence of which any drifting would have had to be of a decided nature and extent before it could be determined that she was actually drifting and dragging anchor and in need of further assistance.

We respectfully submit that no one on board the steamer had reasonable cause to believe that further action was necessary on the steamer's part, until a considerably later time than is claimed by the libellee. Bruhn had been towing carefully and well, and he had not stopped and did not propose to stop at the time or place the line parted. He was intending to take the schooner some distance further (Tr. 391-392), but the line parted. What parted it was not evident to him at the time he noted the fact, and we have his own positive statement that immediately after the line parted he saw the captain of the schooner (or a man on the quarter deck whom he took to be the captain) make a waving motion with his arms which he read as meaning that the tow was sufficient from the schooner's point of view (Tr. 341). From this he assumed that his line had been cut on board the schooner, a circumstance which made him try to yell across in the storm to demand why. Seeing the schooner then drop anchor he not unnaturally assumed the schooner's captain was satisfied to stop there,—in other words he was dismissed. It was Bruhn's part to concede the schooner's master the right to control his own vessel. We here point out that Olson did absolutely nothing, after the line parted, to apprise Bruhn that he wanted any further assistance or attention, although a nearby launch came alongside at that very moment, and solely because its master had seen the line part; he asked if Olson *wanted any help*

or to have a line run (Tr. 159-162, 243, 244, 248-249, 252, 253, 265-266, 280, 281, 422-424), and by this launch Olson unquestionably and by his own admission (Tr. 162) could have sent word at once to the steamer, the obvious course, since there were no lines left aboard the schooner.

Libellee urges that, had Bruhn watched the schooner he would have seen that she was drifting again almost immediately. We rejoin, that the schooner had the better opportunity to notice her own drift, as bearings could readily have shown it, while from the steamer a movement directly away in the same line with the direction of the view was certainly more difficult to detect (Tr. 269, 273, 274). The motion was inappreciable to Cantin, who was a *little to one side*, until he took a bearing and watched it, and by his range he could see a *gradual* move only (Tr. 463).

What was *Olson* watching that *he* did not deem it incumbent on him to signal for help again? He said himself that he "seen lots of small launches around the boat" when the line broke, but he did not hail any of them (Tr. 154). And we say further that it should not lie in the mouth of Olson to charge Bruhn with dilatory action nor with culpability for *not moving to help*,—*a course he should himself have taken but which he even deliberately refused to take*, although positively told and warned that the schooner was actually drifting and would go ashore. We refer to the evidence of the whole crew of the gasoline launch operated by the witness Manuel Lacerdo. Lacerdo had seen the two vessels and gone out to the schooner while the towing was still

under way (Tr. 250, 251), and was close up in the launch to the bow of the schooner at the very time the line parted, and he saw it part on the buoy a little forward of the schooner (Tr. 251). He saw the schooner then drop her anchor (Tr. 252), and he went right alongside and offered to take a line from the schooner to one of the buoys to help hold her, and his offer met with a square and repeated refusal, as well as with a flat denial by Olson that his vessel was drifting or needed a line, and the declaration that he (i. e., the schooner) was "all right" (Tr. 160-162, 243-244, 247, 248, 249, 252, 253, 265-266, 280, 281, 422, 423, 424).

Those on Manuel's launch all said that, although Olson declared he did not want to run another line to the buoy, he did ask Lacerdo to go and see if he could disentangle and bring to him the line that had been attached to the buoy (Tr. 244, 248-249, 252-253, 280, 281, 422-424), and that the launch then went to the buoy and tried to get the line there but was unable to do so because it was badly tangled (Tr. 161, 244, 245, 248, 250, 253, 280, 423). They agree further that, while the launch was then at the buoy, holding fast to it and therefore practically stationary there, it was clear to them from their *side view* of the schooner, that she was actually moving backwards, as they could and did use landmarks or bearings which showed her movement. That they called it "drifting" instead of "moving back" is of little consequence here, even though part of that movement may have been due to paying out of anchor chain, or drift, or both. Upon their returning to the schooner to report their inability to get the line loose

they again told Olson that he was drifting and to give them a line to take to the buoy, which request or offer Olson again refused, saying again he was "*all right*" and *did not want to run a line* (Tr. 244, 249, 253, 266, 280, 281, 423, 424).

The crew of the launch were unanimous on these points, and on their cross-examination they withstood every effort of libellee's counsel to modify their testimony to permit a construction that Olson thereby meant, not that he did not have or did not want a line, but that he had no line to run (Tr. 248-249, 265-266, 281, 424). They firmly adhered to their statements that Olson insisted he was not drifting and was all right (Tr. 248-249, 266). If Olson meant that he wanted a line but had none and therefore wanted to get his own from the buoy, we deny his good faith, because he knew, as well as Lacerdo (Tr. 252-253), that the broken piece on the buoy was too short, and that the 6-inch line he had last run early that morning was also too short because he had paid it all out and let the end go. When then told by Lacerdo that he was nevertheless drifting and would go ashore, he replied that he was not drifting (Tr. 422, 423, 424), that his anchor would hold him, or if not it would be all right if he did go ashore (Tr. 253, 265-266, 268-269).

We do not believe that Olson's testimony at the time of the trial accords with the truth of the matter,—the truth being that for a time he *was not* drifting, at least as far as he knew, and that he *then believed* he was not, and therefore he told Lacerdo he was not drifting and was all right. Otherwise, good faith being assumed, he

would have known whether his vessel was moving by dragging or by paying out chain, and, if by dragging her anchor, he would have acted accordingly *at the time*. Let us note here the important fact that, when later called as a witness, Olson pretended to have “no recollection” of any of this (Tr. 160), or didn’t remember anything of it (Tr. 160-161, 163), and that, while given ample opportunity to have denied it, he *did not deny it* (Tr. 162), but tried, instead, evasively, to say that he had then meant only that he “had no line”,—a version absolutely repudiated by the entire crew of the launch.

It stands out in this case that Olson made absolutely no effort of any kind or at any time to signal or ask for help after the line parted, until when the “Niihau”, on Bruhn’s own initiative, was already sending the line the second time when the schooner was on or practically on the beach (Tr. 33, 34, 55, 57, 77, 88, 93-94, 103, 116, 201-202, 254, 255, 261-262, 284-286, 326, 332, 342-343, 365, 470, 473). The line was already on its way from the steamer in the small boat when the flag went up (Tr. 103-104, 126-129, 207, 228, 229, 315). We submit that the most indifferent person would have paid attention to a signal of any kind, and any ordinary person would have assumed, as Bruhn did, that a signal would be made if help were wanted. Bruhn’s impression as to what Olson wanted was rather the contrary, as he believed he had an affirmative demonstration that the help he had been extending had been pointedly dispensed with. His belief that the line had been purposely cut by the schooner continued until he had a later opportunity, when Olson

came alongside in the pilot's launch, to ask why the line had been cut (Tr. 374, 240).

Even from libellee's side point of view it would be a case of the "pot calling the kettle black", when Olson *now* cries he was neglected and allowed to go ashore helpless and unaided.

Carlson, on the "Nihau", said they were watching the schooner and she seemed to be all right. When he first noticed a backward movement he believed it was natural, as a vessel must of necessity pay out some chain after dropping anchor, and, should it seem advisable, to pay out *more* even later on, if there were any question of sufficiency of the chain already out, for the greater the length of chain the better the hold of the anchor. Carlson said he "naturally thought she was paying her chain out" (Tr. 201), and in this we submit he was correct because both Sach and Olson said they did pay out chain (Tr. 53, 152). Except for that movement, so accounted for to his observation at the time, she did not seem to be moving any, certainly *not dragging* her anchor,—until *a little before eight* (Tr. 200-201). As Carlson put it, "*later*", at about half-past seven or eight o'clock, a quarter to eight (Tr. 200), "I noticed that she was dragging her anchor".

Libellee's own witness, Sach, said that after the anchor was dropped she "*kept on* slackening it (the chain) *all the time*, until probably 60 fathoms were out" (Tr. 53, 486). We submit that 60 fathoms, 360 feet, perforce allowed the schooner to go back a very considerable distance, noticeable to Carlson, who correctly accounted for the movement. It being clear that this



cannot be deemed “drifting”, and certainly not a movement of a character or extent which should have occasioned alarm or concern as to the schooner’s safety at the time, and it being also impossible that Carlson or anyone else on the steamer could have supposed some *further* movement might not also have been due to paying out *more* chain than the 60 fathoms, it cannot be considered that the vessel could fairly *then* have been regarded or even presumed to have been drifting and in need of further help *in the absolute absence of any sign or signal* from the schooner that help was wanted or things were not right, or even that communication was desired. Even libellee’s witnesses admitted the drifting was not immediate. Sach said “we *lay there* and we start to drift” (Tr. 32, 54), but that “she drifted very slowly” (Tr. 33),—“gradually” (Tr. 54-55). Joseph said “*we lay there*, and after a while she started to drag” (Tr. 77). Clover said “then she seems to *hold a spell* and then after that she started to drag” (Tr. 103), and by a “spell” he said he meant about 20 or 30 minutes (Tr. 113). Also he said that “she started easy, *very slowly*, to drift toward the beach” (Tr. 113). Even Olson said “gradually” (Tr. 125), and confessed that he “*could not tell exactly* if she drifted right away” (Tr. 152).

To dwell a little further here on this point of the schooner’s movement, we point out that Carlson on cross-examination said that it had seemed to him that the schooner was holding and that she was in a “safe anchorage”,—i. e., safe place to be anchored (Tr. 222). Thompson said the same (Tr. 315). Carlson had heard



Bruhn's shouted protest attempted to be made over to the schooner, demanding to know why the line had been cut (as he then believed), although he heard no answer (Tr. 225, 239-240). Carlson believed it was about *an hour*, more or less, after the line parted, before he noticed the schooner *dragging* (Tr. 226).

Thompson did not know just when the schooner had dropped her anchor but he believed it was about eight o'clock that he noticed her *dragging* (Tr. 315). The schooner was in a line astern of the steamer (Tr. 315, 269).

Lacerdo said her anchor held her a little while (Tr. 269), but then her drifting began,—only “inch by inch” at first (Tr. 269).

As respects the parting of the line, Bruhn's belief concerning it, and his first notice afterwards that the schooner was dragging, and his action in consequence, we have the following to say concerning Bruhn's testimony:

When the line parted, Bruhn's understanding of what had occurred was manifested by his immediate action in “hollering” to the schooner, to a man on the after deck whom he took to be her captain, “What in hell did you cut my line for?” to which he got (or at least heard) no answer (Tr. 225, 240, 340-341, 375). That “just about when the line parted” that man on the foc's'le head “threw his arms out”,—illustrating by raising arms parallel to floor and dropping them down (Tr. 341). That after that he was standing and looking at the “Haleyon”, and “*after a while* I saw her dragging in shore”, and when asked as to the lapse of time

before he noticed this he gave his estimate as about 15 or 20 minutes. Noticing "that she was dragging absolutely then" he started to her,—to get the line ready to run again to her (Tr. 342-343, 361, 394). She did not begin to drag "right off" (Tr. 401).

Bruhn fell short as a witness merely in that he was unable to judge the lapse of time, in which connection we submit that his estimates of time were wrong rather than that he lay idle for a long time, as libellee claims. He said he thought the line had parted a "little after six" in the morning after he had been pulling about 40 or 50 minutes (Tr. 339-340, 393, 400). Then he said he thought it was about seven o'clock when he first saw the schooner drag her anchor (Tr. 300-301). We note, right here, that, although he placed his time practically an hour earlier than the others, both as to the time the line parted and the time the first drifting was noticed, still he had *an hour between the times*,—six to seven, instead of seven to eight.

Mosher saw her first at about *seven* o'clock (Tr. 343), and, although he then saw that she was dragging her anchor slowly (Tr. 344), it is clear that when he got down to the old Hackfeld wharf at about *eight* o'clock she was *still in about the same place*,—i. e., 600 feet inside the end of the (railroad) wharf (Tr. 344). Hence the drift, to *eight* o'clock, was too small to have been noticeable from the steamer. And the steamer's engineer, Paulos, said the line parted only at 6:50 or 7 o'clock (Tr. 474, 478). And *right away* when Bruhn *did* know it, he started to get his line ready while watching her at the same time (Tr. 361, 394, 396-397). He

said "we immediately got our hawser right in the boat" (Tr. 394). He said here again that he had been watching her for about 15 or 20 minutes when he observed her beginning to move in (Tr. 361). It was only when a heavy sea would come in that the dragging was noticeable (Tr. 361). Bruhn's steadfast belief that his line had been deliberately cut and his services dispensed with is here again shown by his inquiry to Olson when the latter came alongside with the pilot after the second tow,—"What did you cut my line for?" (Tr. 225, 239-240, 374), at which time Olson said that he had not cut it but that it had gotten foul of a buoy (Tr. 374). Bruhn's inability to account for the passage of *two* hours, instead of but one, from the time the line parted until she went ashore (see Tr. 393-410), shows, conclusively, when we note all the other testimony, that Bruhn was simply confused in his own mind about the matter of *time*, both as to the clock and the lapse of time, but that he doggedly stuck to his original estimates, perhaps because he had once given them, although it should early have appeared to him that his inability to account for the balance of his "two hours" was because he was wrong somewhere. He said he "never marked the minutes down" (Tr. 398). His very frankness in saying some of the moves "didn't take long" (Tr. 397, 398) shows his confidence that no time was lost. In point of fact the rest of his testimony, as well as that of others, is clearly and positively to the effect that, *as soon as he did notice* that the schooner was drifting again, he *immediately* hove anchors and started to her assistance the second time (Tr. 201, 227, 361, 394, 396, 403), as he followed her right up, getting his lines ready

meanwhile (Tr. 394-397, 403). This he did on his own initiative, without any inducement or sign from the schooner, and despite his belief that Olson had shortly before not wanted his line beyond the point where the previous towing had stopped. Although Olson's own operations required one-half an hour to run his 6-inch line to the buoy (Tr. 42-43, 106), (remembering also that he claimed the distance was short), he wanted the big steamer to get around quicker.

The whole showing is one of immediate and continued action on the part of the steamer when it was once known that help was necessary again. Bruhn showed, on cross-examination, that he had in mind that it was 15 or 20 minutes after the line parted before he knew she was drifting again, and that it took him another 25 or 30 minutes to get his anchors up, get the lines coiled in the boat, and get down there (Tr. 394, 397, 398), and we submit that he here accounted for the real space of time,—the hour more or less,—that passed. He said that he “never marked the minutes down” \* \* \* “in that space of time we was preparing and moving right along” (Tr. 398). A little time was lost because the men refused to go in the boat with the line until the boat was provided with a surf line (Tr. 399). It was *about half-past eight when the steamer started to pull* (Tr. 404),—a fact which shows that very little time elapsed after the line was started until it had been made fast, the line hove taut, and heaving begun. Getting the line ready in the boat *took time* (Tr. 406). They had to do one thing at a time, and be careful in doing it (Tr. 408), as they were maneuvering in a small

bay, with an unwieldy steamer, considering the area to work in (Tr. 385), and in a heavy, driving storm and “nasty” sea, both driving right to the beach, and all with a necessary recognition of the fact that nothing must go wrong if success were to be attained, to say nothing of what might happen if something did go wrong in an *onshore storm*. Every care had to be taken that each move was safe and sure, and the steamer’s own position carefully secure, not merely for the steamer’s own safety but in order that success might be attained at all. Any miscalculation or slip might quickly have placed the steamer alongside the schooner. Everything *took time*. Steamers cannot be moved like launches, or even as tugs. The navigating area was restricted; the schooner was in shallow water.

At this time we take up the matter of the schooner’s actual position and situation up to the time when relief was thus for the second time extended by the steamer. We submit that the evidence is that she was actually ashore, notwithstanding the denials by some of the libellee’s witnesses. Even were it otherwise, the conditions were such that she would inevitably have been ashore in a few minutes more or less.

Sach said she “drifted very slowly *but she was sure going ashore* if we didn’t get any help and the anchor had no hold”, and he gave 200 feet as his best judgment as to how far they were from the beach (Tr. 33-34), meaning the *land* (Tr. 55, 71). When asked by the court as to how far from the breakers he did not reply, but spoke instead, evasively, of a “ground swell”, and claimed that the mate took soundings and found between

17 and 18 feet of water (Tr. 34),—a depth that was impossible 200 feet from the shore. Later he claimed the breakers were 100 feet further in (Tr. 71). Asked, point blank, by his own (libellee's) counsel whether she struck *shore* he said he didn't think so, as he "didn't hear nothing", nor feel any *shock* (Tr. 36). He admitted they were "dragging anchor then"—when they put the flags up, and all the chain out (Tr. 57).

Lacerdo, who took Mosher out in his launch, had to drop anchor when something went wrong, and he had *only 12 feet* of anchor chain (Tr. 256), and knew that where he anchored the water was only 8 or 9 feet deep (Tr. 256). He judged that the schooner had 9 to 12 feet of water at her stern (Tr. 257). Her bow would go up and down with the swells but the stern did not (Tr. 257).

The witness Joseph said the schooner "kept drifting and drifting right in towards the beach" and when the flags went up "we might have been a hundred feet further from the first line of the surf" (Tr. 78). On the point of distance from the beach he said that the pilot's launch was "right astern of us" and the launch "wasn't a very long distance from the shore" (Tr. 88).

The witness Piersen said "Oh about couple of hundred feet; or may have been more" (Tr. 94). The witness Clover said that when the flags went up they were "close to somewheres around two hundred feet, maybe not two hundred feet" (from the shore) (Tr. 103), and he meant the sand beach (Tr. 116), although he said she was "outside of the *main* breakers" (Tr.



116). And by the "main breakers" he meant "the one that breaks right ashore" (Tr. 116),—a pretty close call to saying that they were outside only of the breakers on the beach, but inside of any others.

Even Olson admitted they were "not very far from the breakers" (Tr. 125), and he insisted throughout that he was drifting right along without a stop,—a situation where the schooner would soon have been ashore if, indeed, not already so, and he is condemned out of his own mouth when on cross-examination he admitted that "she commenced to swing a little, part a little", "beginning to turn broadside when the line came" (Tr. 171), and "until the line was fast your (his) vessel was gradually drifting broadside", and when the line was hauled taut she "commenced to straighten up" (Tr. 171-172).

But on the part of the libellant the testimony is positive that the schooner did go ashore, and this was not dependent merely upon judgment of distance from the water's edge. The position which the schooner assumed after she reached a certain point, from dragging in line with her anchor to cessation of stern movement and continuation of bow movement toward broadside, and the difficulty with which she was pulled off by the "Niiau" on this second occasion, show conclusively that her stern not only had struck bottom but had gone rather hard aground.

R. W. Filler, a wholly disinterested witness, who had gone to sea and knew whereof he was speaking, said the schooner *struck*, and was gradually broaching to, and he saw her lift bodily and come down, her



spars quivering when she struck, and her bow began to swing toward Wainaku (not Waiakea in this instance) (Tr. 289-290); and he knew the action because he had had two experiences of the kind, and said that it is a known fact that the moment a vessel gets into shallow water she will broach to, in consequence of her stern touching first and the wave action turning her around broadside, and she was then "past the stage of dragging her anchor" (Tr. 292-293). In his judgment the water was 10 or 12 feet deep by the schooner (Tr. 291).

Pilot Mosher, another disinterested witness, who was on the scene at this stage, and went on board the schooner, testified that as soon as he got on board he told the captain she was touching the beach, and that he felt the distinct shock (Tr. 347, 353), and that her position had altered and she had swung more towards the land (Tr. 347). That she "didn't drag any further because her stern was on the beach; the anchor was simply no good to her" (Tr. 350); and "if the 'Niihau' hadn't had any line on that vessel, and her stern in the position it was, within a few minutes she would have swung around broadside to the beach because her anchor wasn't doing any good to her at all" (Tr. 350, 354). Her anchor and chain would never have held her (Tr. 349-350). He said the pounding of the vessel "*indicated to me very forcibly* that the vessel's stern was being lifted and pounded on the beach" (Tr. 353).

Mosher said she was so close to the beach that it would not have been safe for him to have gone around

her stern in the launch as he would have gone right into the surf to do it (Tr. 357), and, in his judgment, from her stern to the beach was not over 150 feet (Tr. 358). Lacerdo said he was *in* the surf when he anchored his launch (Tr. 256) and just as he was previously nearing the schooner a big swell washed over his bow and got in his engine and caused the trouble (Tr. 255-256).

Libellee's own witness, Nichols, while not feeling capable of answering the question of whether she was "on the beach", although he did not think so, nevertheless did not believe that her dragging stopped before the line got to her (Tr. 459); yet, even then, he said "but not so fast as she was when the signals broke out" (Tr. 459);—showing, we think, that the movement of the vessel had at least begun to be impeded by the bottom, and her slower movement was due to her being forced further and harder on the bottom. Nichols admitted she was pointing so that she was "apparently *broadside* to me" (Tr. 460),—and he was on the railroad wharf (Tr. 454, 459).

A. S. Cantin (not Campbell) was a disinterested observer, and in his judgment she was on the beach with her bow pointing toward Hilo Sugar Co. mill, her body line being 15 or 20 degrees to the beach (Tr. 465). He testified also that "when they were pulling her off you could see that she landed on the beach" and spoke of the way she would lift with a wave or swell while they were pulling, and at such times come a little "and that's the only way they got her off" (Tr. 467).

The witness Balding said she was *still drifting in* and going pretty fast, when he took a bearing on her on a red-roofed house near the end of the bridge near the post office, from his position near the Matson warehouse (Tr. 282-284). Libellee's counsel seemed to give much value to Balding's qualified reply on cross-examination that the schooner was drifting all the time until the steamer took hold of her (Tr. 286), but he said also that toward the last her drift was *slower* (Tr. 286), similarly as Nichols did, and stated positively on direct examination that she was touching shore, her stern rising and coming down and bringing up on the beach (Tr. 284-285).

See also transcript pages 365, 370, as to her bow swinging around, in her broadside movement.

Further references to indicate that the vessel was in fact on the bottom, close to the beach and breakers, are the following: Transcript 207-208, 230, 232, 233-234, 238, 241, 255, 257, 319, 321, 322, 364, 365, 370, 410.

The question of the depth of the water under the schooner on this second rescue is disputed to some extent, the libellee naturally claiming sufficient depth to tally with their claim that she did not get on the bottom. Sach said 17 or 18 feet (Tr. 34); so did Joseph (Tr. 85); and Olson said 18 feet "when I raised the signals up" (Tr. 126), which he also said was *before* he stopped drifting.

Sach seemingly did not know the draft of the schooner, but guessed at it, and said it "couldn't be more than fourteen feet" (Tr. 46). Had he dared venture it at 12 feet we think he would have done so.

Joseph put it "probably a little over twelve" (Tr. 85), and we would put the accent on the "probably".

Carlson said that although she may have drawn 12 or 14 feet of water afloat (Tr. 234, 237), she was in his judgment in 6 or 8 feet of water (Tr. 237). Thompson judged the depth at 7 or 8 feet (Tr. 320). Lacerdo, the gasoline-launch man, whose business requires familiarity with Hilo Bay, said the schooner was between 9 and 12 feet, and he was himself anchored right astern of her in 8 or 9 feet (Tr. 256, 257), and his own chain was only 12 feet long (Tr. 256),—and to hold his launch at anchor it certainly was not perpendicular. Filler "surmised" between 10 and 15 feet (Tr. 292); Pilot Mosher believed the depth to be from about 7 to possibly 10 feet at her stern and 18 feet at her bow (Tr. 352, 359),—and he described how the bottom there was rather steeply inclined (Tr. 353, 359). This accords also with Carlson's placing of the schooner's position on the map at H-2 where the map shows a depth from 6½ feet to 8 feet (Tr. 237).

Further evidence of the schooner having been actually pretty hard aground at her stern will presently appear in our presentation of the manner in which she came off. At this point we take up again the second salvage operations of the steamer.

We note, first, that the steamer had gone a little further ahead and dropped anchor after the line parted, and that the schooner after dropping anchor had paid out about 60 fathoms of chain and thus increased the distance between the two vessels, and also that the schooner by drifting still further got out of reach of

any line the steamer could have sent from her then position, especially taking into consideration the continuing drift of the schooner and the time which would have to elapse before a line could be sent at all. The situation therefore necessitated a shift of the steamer's position. The map, with reference to scale, shows that the schooner had only a little way further to drift, considering the 60 fathoms of chain already let out, until she would be pretty well into shallow water, and that the steamer could not have gotten appreciably nearer by merely paying out more anchor chain. And see transcript page 479 as to the line being too short. It was safe and prudent for Bruhn to have allowed, as he did, for further drifting before any line could be sent, and that he took no chance of an ineffectual effort to reach her from that position. Nor could the steamer have drifted back at all without heaving anchor. Moving forward, the steamer hove anchor and steamed a course out and away from the railroad wharf, around toward Wainaku and then inshore again toward the schooner (Tr. 469). At a point on the Hilo side of the outer buoy (Tr. 361), at about the same spot where the "Haleyon" herself had dropped anchor (at H-2) when the line had previously parted (Tr. 361, 362), the steamer dropped first one anchor to which she swung around, and then dropped the other, coming up a little again (Tr. 464, 469), and placing them apart to make them efficient (Tr. 241-242, 469). This done, the steamer paid out 90 fathoms of chain on each anchor (Tr. 228, 362), and then fell back with the wind and sea until she rode securely to both anchors (Tr. 464,

469), after which her final position was stern to the schooner at a place approximately shown by her position No. 3 as marked by Bruhn (Tr. 362) on the sketch in evidence as libellant's Exhibit B (see Tr. 385 and 205, 365).

By this time the schooner was at position H-3 (Tr. 365) and was then commencing to swing her bow around as before stated (Tr. 365, 370).

The 6-inch line with the 4-inch line attached was again coiled in the small boat, similarly as on the first occasion (Tr. 227-228, 363, 457-458), the boat being then alongside (Tr. 399, 441, 457), but not despatched until the steamer stopped moving on account of the danger, otherwise, of having the boat aft (Tr. 408). After a surf line had been provided for the small boat at the demand of its crew who refused to go without it (Tr. 399), the boat was despatched with the line. The surf line was used to manage the small boat and to haul it back after the line was passed on board (Tr. 130, 212), and was necessary because, after the boat should get near the schooner and into the surf, the men would not be able to pull the boat back against the wind and sea (Tr. 367), and as a safeguard to the boat and men in case anything happened, such as being swamped (Tr. 368).

The boat got close enough to throw a small heaving line on board the schooner by means of which the 4-inch line was hauled on board (Tr. 206-207, 228), and, by it, the 6-inch line. Even though Easton and Nichols, for the libellee, claimed that the boat started from the steamer with the line *after* the signal was



put up on the schooner (Tr. 440, 441, 455, 458) they said it was *immediately* after (Tr. 439-440, 441-442, 458), and the greater weight of the testimony is that the small boat was already on its way when the flag went up (Tr. 103-104, 126-129, 207, 228, 229, 261, 315). In any case the line was already coiled in the boat (Tr. 315), and the actual despatching of the small boat was but the last step in the series of moves begun long before by Bruhn on his own initiative, without any signal from the schooner. It was only about five or ten minutes after the small boat started with the line until it was on board the schooner (Tr. 207, 441, 458), and only about another like period of time until the 6-inch line had come on board and been made fast (Tr. 207, 371), whereupon the steamer immediately began to heave the line taut with her windlass (Tr. 371).

It will be remembered that at this time the schooner lay with her bow swung around pointing toward the Hilo Sugar Company's mill, at Wainaku (Tr. 207, 256, 319, 347-348, 365, 370, 371, 410, 460, 465), so much so that Mosher said her stern was toward Waiakea River (Tr. 346), and she was churning up sand (Tr. 208, 230); and from the "Nihaan" only her starboard side could be seen (Tr. 208, 319, 460). Carlson said that when she rolled he could see half-way to her bottom (Tr. 238). We here add to what has already been said as to her being actually aground, that, while the schooner had, while dragging, been held in a line with her own anchor and chain, this movement changed when the bottom held her stern. She then began turning broadside toward Hilo (Tr. 207, 241), *but*

*leaving her anchor chain extending out in its original direction*, which in time became approximately at right angles with the way her bow was finally pointing (Tr. 242, 256). This could only have been possible by a continuing freedom of movement of the bow while the stern held fast. The whole testimony is that up to this point the schooner, in drifting, had been carried directly in the line of the wind and sea (Tr. 152-153, 256, 259, 268, 271, 272, 273, 317, 344, 361, 362, 393, 418 460), directly south by compass (Tr. 317, 344), passing close to the piles (Tr. 254), and in the direction of the old boiler of the wrecked "Kilauea-hou" on the beach (Tr. 33, 55, 88-89, 116, 202, 206, 227, 255, 271-272, 273, 274, 312, 300-301, 465); the location of the boiler having been marked approximately by Carlson on the map in evidence as libellee's Exhibit 1 (see Tr. 206). Lacerdo had been watching the schooner drifting, and said she passed about 200 feet off the piles (Tr. 254), and when she put up the flag she was perhaps 3000 feet from the piles toward Hilo (Tr. 255); and that her position was then about 200 feet from the beach (Tr. 255). He also said she was listing and turning toward Wainaku mill, with her anchor straight out *at right angles* from her (Tr. 256), and the seas struck her only on the starboard side (Tr. 259). Also that she would lift with the swell and drop down part way with the swell and then stop while the swell itself would fall lower (Tr. 257-258).

Under the conditions thus indicated, the second pull by the steamer consisted first in a careful tightening of and straining on the 6-inch line (Tr. 208, 212

290-291, 371), the steamer heaving on her own anchors for the purpose (Tr. 290-291, 371), until, with the aid of the swells which lifted the schooner at intervals, her bow was gradually worked around until the schooner was again in line with the wind and sea and her former line of drift, again heading off shore and toward the "Niuhau" (Tr. 260, 275, 321, 372, 411). In Mosher's opinion, although he himself hove in on the schooner's outlying anchor as soon as he got on board (Tr. 356) with the idea of helping to get her bow out again, it wasn't materially effective because "our anchor was going right through the sand. I don't think it was doing any good" (Tr. 357). Of course it *helped*, for it weighed 1800 or 2000 pounds (Tr. 73, 57, 143), but it wasn't holding. The bow having been brought around, the heaving was suspended and the vessel held thus while another line, a 7-inch line, was also sent to the schooner in the same way as the first and also made taut (Tr. 25, 208, 231, 320, 333-334, 372). Sach's reference to a "100-ft. pull" (Tr. 65) must have been to the time they stopped to run the 7-inch line. Both the 6-inch and 7-inch lines were then made fast to the bitts and brought to an equal strain (Tr. 372, 407, 411). When the lines were taut the two vessels were about 60 fathoms apart (Tr. 420). Then, by heaving on her anchors (Tr. 208, 212-213, 259-260, 291, 328, 407), and steaming on her engines, advantage was taken of every bit of slack that could be gotten on the lines, by taking in links of the anchor chain as the slack came with the schooner's giving with the swells (Tr. 320, 372-373). For a time the vessel did not otherwise move appreciably,

if at all (Tr. 232, 233, 260, 373), but, after consistent steady pulling, she very gradually came (Tr. 208, 232, 233, 260, 291, 321, 373, 407), and finally came free.

Then the steamer hove up her anchor and moved steadily and smoothly along with the schooner out into deep water (Tr. 35, 65, 89), and, at a signal from the schooner (Tr. 208, 373), the steamer dropped anchor when at a place near the "Enterprise" (Tr. 61, 208-209, 351).

The operation of rescuing the schooner on this second occasion took considerable time, from which it is clear that it was not a case of towing out a vessel free of the bottom. In Lacerdo's judgment it took in all an hour and a half of pulling (Tr. 275-276). Thompson said it was probably half an hour before she started to move (Tr. 322), Easton took the time the tow was over,—10:15 by the clock (Tr. 440), which shows the last tow took  $1\frac{1}{2}$  hours, and could not have actually begun before 9 o'clock. By Nichols' time taken by the watch and noted down, and by Mosher's time noted by a clock on the waterfront, the distress signal went up at 8:35 o'clock (Tr. 455, 458-459, 345), which again supports our contention that it was eight o'clock, not seven, when the steamer moved for the second rescue.

Although the whole operation took time, it had to be done steadily and surely. A break would have been disastrous. Bruhn had had experience, and we are not without a *favorable* criticism of his course in this case. Capt. Filler was an old sea dog and had had experience in working on stranded vessels, and he took note of the very gradual way in which Bruhn

worked the schooner off (Tr. 290-291, 295), and, as a witness, expressed his opinion of the seamanship shown by Bruhn by saying "I remember at the time I admired the fellow's seamanlike way of doing things" (Tr. 295).

The towing having thus stopped, the schooner also dropped her one anchor (Tr. 61, 209), and, when it was seen that it wasn't holding (Tr. 209), the master of the schooner, Olson, accompanied by Pilot Mosher, came from the schooner to the steamer in a launch, and stated that the schooner had lost one anchor and had but one remaining and he was afraid his chain would carry away, for which reasons, and in view of the heavy storm still prevailing, he asked Bruhn to hold onto the schooner until the weather should moderate, to which Bruhn agreed, stipulating only that he be allowed first to shift his own position to a more satisfactory one (Tr. 174, 209-210, 351, 374). This done he held the schooner by two lines all of the remainder of that day and throughout the following night (Tr. 66, 210). At about seven o'clock the next morning, January 14th, the weather having abated, the lines were cast off and the schooner thereafter rode safely (Tr. 175).

Although the "Niihan's" lines were finally cast off on January 14th, the day following the rescue, the weather continued to be so rough that Capt. Olson did not venture to leave the schooner and go ashore to note a marine protest until the *succeeding* day, January 15th (Tr. 168-170), for the admitted reason that he could not have safely left the ship prior to that time (Tr. 170). The Marine Note of Protest (libellee's

Exhibit No. 3, Tr. 490-492), made as it was on January 15th, at a time when the occurrences were still vividly fresh in Capt. Olson's mind, and two days before the filing of the libel and issuance of monition herein, contains some extremely pertinent statements, as to the danger to the schooner on both occasions and as to the time when he observed her to be in danger after the first tow-line parted.

With reference to the danger before help first came from the "Niihau", he says (Tr. 491): "The starboard anchor was let go, but through poor holding ground the anchor failed to hold, *and the vessel was gradually drifting ashore.*" After the tow-line had carried away and the schooner had anchored "*at 8 a. m. it was seen that the vessel was drifting ashore fast.*" This statement differs very materially from his subsequent deposition that the schooner gradually drifted all the time after the dropping of the starboard anchor (Tr. 125, 155).

Furthermore, "at 9 a. m. Tuesday morning the steamer 'Niihau' again got 2 hawsers fast aboard" (Tr. 492), a lapse of time of only one hour from Olson's realization at 8 a. m. that his vessel was fast drifting ashore. Subsequently, in his deposition, in connection with his statements that the schooner was continually drifting from the time when the tow-line parted (Tr. 125, 155), he complained that he was waiting for a line for over two hours (Tr. 154-155), and that "There was nothing done from half-past six to close to nine o'clock. There wasn't a thing done" (Tr. 126). Olson, therefore, at a time when he was



performing his duty as a master mariner in noting a marine protest of the then but just terminated rescue of his vessel, and before any question of litigation of salvage arose, voluntarily stated under oath that the schooner had twice been saved from drifting ashore, and that the interval between his realization of the second danger and the *making fast* of the two hawsers from the "Niilau" was one hour.

The marine note of protest also discloses another instance of Capt. Olson's apparent deterioration of memory. In his deposition, he dismisses the collision of his vessel with the schooner "Ka Moi" by the brief statement that "we drifted astern until we touched the little schooner" (Tr. 120), while in the marine note of protest he averred that "the vessel dropped down on top of the schooner 'Ka Moi', which was moored astern of us alongside of wharf, carrying away his flying jib-boom jumper stay, also smashing our small boat and after taffrail, and breaking the davit fastenings" (Tr. 491).

Coming now to the Surveyor's Report and the Final Report of the Board of Survey (libellant's Exhibits "C" and "D", Tr. 485, 489), it appears that the hull of the schooner, in several places, was in extremely poor condition owing to decayed timbers (Tr. 485) and uncaulked planking above the water line (Tr. 486). The mizzen-mast was rotted half way through (Tr. 485), while the keelson and sister keelson were "in as nearly as bad condition as the timbers" (Tr. 485), and a piece of the keel about five or six feet long was gone (Diver's Report, Tr. 488).

The inevitable conclusion from these facts is that the schooner, with weakened keel and keelson, *would have pounded to pieces in the breakers had she not been rescued by the "Niihau"*. The court says in its opinion (Tr. 489): "The evidence in the case shows that the schooner was old and in a weak condition from age and decay." And the court makes the unequivocal statement (Tr. 495): "I am convinced from the evidence that on both occasions the schooner was in great danger of going ashore and of becoming a total loss if she had gone ashore."

The Final Report (Tr. 489) shows conclusively the success of the salvage operations, for the schooner was rescued before she had been damaged to any extent, and the few repairs which had been necessary,—the caulking of the planking above the water line, the strengthening of the mizzen-mast, and the repair of the channel plates (Tr. 489) were judged sufficient, together with the (second) Diver's Report (Tr. 489-490) to the effect that the bottom was in seaworthy condition without repair, for the board's conclusion that the schooner had been made "reasonably safe to undertake the voyage to the Pacific Coast" (Tr. 489).

The entire situation is thoroughly summed up in the opinion of the court below (Tr. 497-498):

*"The case presents itself to my mind as one of the most satisfactory cases of salvage on the part of the salvors that has appeared in this court. The agents of the libellant, upon being informed of the danger of the libellee, promptly came to her assistance in the darkness of the night, under circumstances of some danger to its steamer, and removed her from her dangerous position to a safe*

*one in the harbor, or which would have been a safe one if the libellee had been equipped with her two anchors. As soon as the agents of the libellant noticed that the libellee was drifting again they began preparations for her relief, and continued such preparations until they were ready to send her a tow-line the second time, at which time the libellee was in a dangerous position and, without the relief which was given her, was in prospect of becoming a total loss. I cannot find from the testimony that there was any neglect or inexcusable delay on the part of the libellant's agents.*

*"The salving methods were the best, and were carried out with skill and courage and resulted in the entire deliverance of the libellee."*

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#### AMOUNT OF AWARD.

The trial court stated in its opinion that in view of the circumstances, these being that the ship was in the greatest danger and was, in the court's opinion, rescued from total loss, and that the danger to the cargo was considerably less (Tr. 499), but that "In any case, the danger to the cargo was considerable" (Tr. 499), it would award to libellant one-half of the \$1500 stipulated value of the schooner and one-third of the \$6381.85 stipulated value of the cargo including insurance and freight money (Tr. 195-196). The value of the "Niihau" was stipulated to be from \$45,000 to \$55,000, and she carried a master and a crew of 37 men (Tr. 461). The salving operations were performed promptly and with complete success. The trial court stated that the case was one of the most satisfactory cases of salvage on the part of the salvors that had appeared in that court (Tr. 497), that the

uncertain time merely approximating two hours, which elapsed between the breaking of the tow-line after the first rescue and the delivery of a towing hawser to the schooner on the second rescue, did not appeal to the court as being a very substantial basis for libellee's contention of inexcusable delay, in view of the thoroughly substantiated testimony setting forth the prompt, efficient and successful preparations made for the second rescue as soon as the "Niihau" observed that the schooner was drifting (Tr. 496-497); that, far from there being any neglect or inexcusable delay, "The salving methods were the best, and were carried out with skill and courage and resulted in the entire deliverance of the libellee" (Tr. 498), and that there was considerable danger to the salving steamer on both occasions (Tr. 497, 498).

It is to be noted that this case emphatically differs from the not infrequent cases of importunate salvors waiting to take instant advantage of an unfortunate vessel's necessities and to force their oftentimes deliberately and histrionically exaggerated assistance upon her, with a canny eye in the direction of a responsively inflated award.

The "Niihau" was not a salvage vessel nor engaged in the towing business, but a freight steamer, lying safe at anchor in a heavy gale, with steam up and engines ready (Tr. 474) to depart upon her lawful occasions, as she was to sail very early that morning, at about 3:30 a. m. (Purser Morton, Tr. 296) or at about a quarter to five (Chief Engineer Paulos, Tr. 474).

Far from soliciting to assist the schooner, of whose plight her master and crew were ignorant, her purser's boat responded as it passed to a shouted appeal for help from the schooner, accompanied by the statement that the schooner was ashore and wanted a line (Tr. 297). Ready to sail as the "Niihau" was, her captain, upon receiving this appeal and discarding his regular business, responded immediately to the emergency, getting a tow-line ready and sending back the same boat which had just brought the purser, through the storm, a gale so severe that the boat's crew refused to risk their lives a second time without a surf line (Tr. 309, 326, 399). Meanwhile, the steamer raised her anchors and steamed ahead cautiously in the dark and came in between the railroad wharf and Buoy No. 3 (Tr. 336), and there anchored at the point marked N-2 (Tr. 337, 340, 390). This advance was one involving considerable danger to the steamer because of the possibility of entangling her propeller with the tow-lines (Tr. 498, 497), and because of the equally present possibility of knocking off the blades of the propeller against the buoys (Tr. 376-377) and of the steamer's swinging and coming into collision with the buoys (Tr. 385-387, 414).

Anchoring and paying out ninety fathoms of chain the "Niihau" dropped back toward the schooner, received the tow-line back on board from the boat, and steamed at full speed ahead for more than two hours, pulling the schooner off the beach and out to the end of the railroad wharf. During this maneuver there was constant danger of her engines breaking

down under the heavy strain, for the lumber loaded schooner was almost as large a vessel as herself ("Haleyon", 120 to 130 feet long; "Niihau", 150 feet long), and such a breakdown at the height of the storm would have wrecked the "Niihau" in her turn on the beach (Tr. 334, 498).

Furthermore, and with prompt and most efficient caution, the "Niihau's" captain had, immediately upon making fast the tow-line, sent the boat back, *this* time with the surf line demanded by its crew, to take soundings around the schooner before he should begin to tow, in order to ascertain if there was any rock or other obstruction to the towing (Tr. 382).

As soon as the tow-line parted the steamer dropped her anchors, remaining at that anchorage both because Capt. Bruhn had noticed that the schooner had but one anchor, and because the gale was so heavy that he thought it advisable to stand by. As soon as the steamer observed the drifting of the schooner, preparations were made to go again to her rescue, and another tow-line was sent by a boat (again provided with a necessary surf line), and the "Niihau" raised her anchors and steamed in as close as she dared to the "Haleyon" on the beach, and again towed the schooner out of danger. Again the strain upon the "Niihau" was very severe, and she was exposed again to the dangers of breaking down her engines and of a line fouling her propeller (a danger to which she was *actually* subjected at the time when the first tow-line parted), in which event she could not have used her engines and would



inevitably have been swept on the beach by the gale (Tr. 324, 377-379, 498).

Turning next to the danger to the officers and men of the "Niihau's" crew, who made the salving of the "Haleyon" possible by taking heavy tow-lines to the schooner in one of the "Niihau's" boats (propelled by *oars*, not by an engine), it is to be noted that they made four absolutely necessary trips during the height of the heavy gale. The first one was made with the first tow-line at a few minutes past four in the morning, and without the partial assistance afforded by a surf line only because Capt. Bruhn "at that time didn't know the danger that there was" (Tr. 416; see also p. 369). The second was made immediately upon the return of the boat to the "Niihau", with the end of the tow-line, for the wise purpose of taking soundings to determine whether there were any rocks or other obstructions around the schooner to prevent the salvage operations, or to necessitate their being undertaken from some other position. On this second occasion, as on the following two trips, the boat was provided with a surf line because "The crew refused to go in there without a surf line. It was dangerous" (Tr. 309). Only two soundings were taken, off the bow and forward of the mizzen-mast, because "We was anxious to get out of there as quick as we could", as Mate Thompson frankly stated (Tr. 310). "She was in considerable danger because if that boat capsized that would have been the last of us" (Tr. 311). While the regular crew of this boat was five men (Tr. 323), on all three trips following the first the mate carried

a crew of eight or nine men to double-bank the oars (Tr. 312, 323, 327), and, even with that increase in power, it required a heaving in of the surf line on the steamer's winch to bring the boat back to the ship against the wind and sea (Tr. 312). The third and fourth trips were made, one at the beginning of the second salving operation, the other as soon as the schooner had been pulled off the beach (Tr. 320), shortly before nine o'clock in the morning (Tr. 480, 492), and the boat experienced even rougher and heavier squalls as compared with those during the first salving operation (Tr. 331, 417).

There was danger of capsizing, or of swamping, on *all* these trips, involving the possible loss of the boat, the danger of men getting caught underneath the boat, of getting hurt and disabled by being swept against it, of the boat's possible destruction as a result of being hurled by the heavy seas against the schooner or of getting under her head gear, and finally the danger of loss of life in any of these events. Thompson, for instance, the mate who had charge of the second and third trips, confessed that he could not swim (Tr. 323, 327-329, 331, 333, 368, 377). That serious danger to the boat and her crew existed cannot be doubted, and there is no testimony to the contrary.

The *schooner* was rescued twice from total loss solely by the indefatigable efforts of the libellant's agents. That she would have been a total loss in all probability is the unanimous opinion of the three disinterested expert witnesses in the case, all of whom qualified as such, and all of whom were also eye-witnesses of the

second rescue. They were Capt. Mosher, the harbor master, who took charge of the schooner during the second salving operation, a witness for libellant; Capt. Filler, holding a master's license, called as a witness by both sides; and Capt. Duvel, also holding a master's license, a witness for libellee. Capt. Mosher, who boarded the "Halcyon" in the performance of his duty just after the 6-inch line was made fast, and before the second tow began—the only one of the three expert witnesses who was on the spot—testified repeatedly that as soon as he got aboard and went forward he saw that the "Niuhau's" line was fast and *felt* the shock of the schooner pounding on the beach, and so informed the schooner's captain (Tr. 347, 349, 350). This testimony was unshaken on cross-examination (Tr. 353), during which he gave it as his opinion that the "Halcyon" was a very old vessel and that, considering the weather as it was the following day, she would not have lasted throughout that day, but would have broken up, if the "Niuhau" had not rescued her (Tr. 354-355), and that the cargo would have thereupon fallen out and part of it drifted to a point ashore, "How much of it would have drifted there, it's pretty hard to say" (Tr. 355).

Capt. Filler observed the schooner ashore and pounding and swinging broadside to the beach (libellant's witness, Tr. 290), and, when called as libellee's witness, gave his opinion that the "Halcyon" (if not rescued) would have swung broadside to the beach and pounded until absolutely unseaworthy, and that, assuming that she was a pretty old vessel, "Three or four hours

would seal her fate'' (Tr. 426-427). Libellee has made much of his opinion that, in the face of subsequent conditions, he did not believe the vessel would have *gone to pieces*, although the sea was rough enough to render her unseaworthy (Tr. 428), but the trial court itself comprehensively brought out his further opinion (one which completely nullifies libellee's argument below that the witness had meant that the ship would not have been a total loss) to the effect that, without breaking up, a vessel can be so badly injured by the pounding of the sea, or can be so imbedded without injury in the sand (and this was a sand beach, Tr. 354), as to be a total loss. Capt. Filler also testified that if the schooner had broken up it would have been possible, in his opinion, to save the greater portion of the cargo of lumber (Tr. 429), in more or less damaged condition (Tr. 430), while "Some of it might go straight to sea" (Tr. 433).

Captain Duvel, libellee's expert witness, testified that, if not rescued, the "Halcyon" would have gone broadside onto the beach and keeled over, and that if the rough weather had continued long enough she might have broken up, and "it might have taken a week" (Tr. 446-447), or that, assuming the weather had subsided to the condition existing when she came back to the wharf—"smooth, smooth weather"—she might, in his opinion, if she had gone ashore unrescued, have filled with water and sunk, or she might have become imbedded in the sand and "she might have been there today" (Tr. 448). All this was on his *direct* examination by libellee's proctor. As to the cargo, he believed

it could have been saved if the vessel had become imbedded in the sand, although he had never had any experience in the salving of lumber cargoes (Tr. 449-450).

We will now return to the sequence of events after the "Niihau" had for the second time towed the "Haleyon" out of danger. Both vessels then anchored in a safe anchorage, and, Harbor Master Mosher advising Capt. Olson that his anchor was not holding, and would not hold in that gale, they both went over in the small boat to the "Niihau" and asked if Olson could have a line on board to hold the schooner during that day and the succeeding night, to which Capt. Bruhn assented (Tr. 174, 351, 374). The "Niihau" stood by, holding the schooner in safety, until about 7:30 a. m. on January 14th, when the weather had moderated a good deal (Tr. 175), and Olson admits that he did not even then ask to have the line let go but that the captain of the steamer "called to me to let go" (Id.).

The errors alleged in the assignment of errors herein (Tr. 511-515) have already been thoroughly argued in this brief, with the exception of the 11th and 12th. The apostles on appeal themselves answer the 12th alleged error. The claim of the 11th alleged error, that the libellant's services were performed solely pursuant to a contract for the towage of the schooner, is utterly absurd and wholly untenable. There is not a scintilla of evidence, not a hint of the possibility of inference, that any contract was made. To suggest the compensation of the libellant on a towage

basis is either superb assurance or the expedient of desperation, probably the latter. The libellant is emphatically *not* in the towage business; it is a common carrier operating its freight and passenger steamers on regular schedules in the inter-island trade, and the very regularity of that service is an important element of value in its business as a common carrier serving the public, and any interference with that element necessarily connotes inconvenience to the public and loss to the carrier. The "Niihau", as shown by the testimony of her purser and chief engineer, was about to sail on her public business when the appeal for help came, and she delayed her voyage from twenty-six to twenty-eight hours, as appears from the evidence. To clothe this alleged error with facts, to say that the "Niihau", lying safe at anchor and ready to begin her voyage at dawn, was lured into seeking a towing contract with a schooner lying in the darkness among the breakers on a lee shore, risking her master's license, her own safety and the lives of her boat's crew in order to pick up a tow, is to annihilate the alleged error.

The coasts of the islands comprising the Territory of Hawaii are uninviting and dangerous, guarded by precipitous cliffs and living coral reefs. There are only two commercial harbors in the group which are ordinarily reasonably safe in all weathers, Honolulu and Hilo, and yet this very case occurred in Hilo Harbor! Nevertheless, the very considerable volume of traffic in the territory must be carried almost exclusively by sea, whether inter-island or with any



Pacific mainland. The perils of navigation are very considerable,—witness the numerous cases of stranding in calm weather upon the reefs,—and an attentive appreciation of those perils, and the consequent weighty importance of the encouragement of prompt and efficient salvage of vessels in distress, is respectfully urged upon this court. Attention is directed to the many cases of salvage occurring in the waters of Florida, the danger and extent of whose coral reefs have caused the federal courts to recognize that a higher scale of awards for successful salvage operations should obtain there than elsewhere. Hawaii has not only equally numerous and dangerous coral reefs in proportion, but great stretches of no less dangerous coastal cliffs as well.

In this case the value of the property salvaged was exceedingly low. It is a well settled principle of salvage law that in such cases a far higher percentage is to be awarded to the salvors than in cases where the salvaged value is large, for the obvious reason that otherwise the salvors cannot be adequately compensated.

See

24 Encyc. Law, 2 ed., 1210 and cases cited  
in Note 4;

35 Cyc. 754.

In *The Blenden-Hall*, 1 Dods. 414, the court says:

“In fixing a proportion of the value the court is in the habit of giving a smaller proportion where

the property is large and a higher proportion where the value is small; and for this obvious reason, that in property of small value, a small proportion would not hold out sufficient encouragement; whereas, in cases of considerable value, a small proportion would afford no inadequate compensation.”

In cases of very small values, therefore, awards of 50% or 33⅓% are by no means unusual.

See

Note to *The Lamington*, 86 Fed. at pp. 685-692;  
*The Nathan Hannan*, Fed. Case No. 10,029;  
*Tyson v. Prior*, Fed. Case No. 14,319;  
*The Penobscot*, 103 Fed. 205 at p. 208.

In fact, in some instances of small values, the *whole* of the property salvaged has been awarded to the salvors.

24 Encyc. Law, 2 ed., 1214.

Moreover,

“Where salvage services are rendered by merchant steamers they should be favored in determining the amount of the award, and care should be taken not to establish a precedent through insufficient remuneration, which would tend to discourage merchant steamers from rendering assistance at sea when there is real or apparent danger.”

*Id.* 1206 (and see cases there cited).

As this court probably knows from past cases, the steamers of the libellant, plying their passenger and freight business between the various Hawaiian ports, are in many instances the sole hope of distressed mariners, for there is no other line which regularly

traverses those dangerous waters. The libellant, therefore, should be liberally rewarded for giving up its regular business and assisting vessels in trouble, and especially so when it renders services to hulks like the "Haleyon" in "a rotten and water-soaked condition" (Tr. 485), whose floor timbers were "in such a rotten state, as to enable us to drive a crowbar clean through them without the slightest exertion" (id.). That such a vessel should be salvaged in practically an undamaged state constitutes an achievement of high merit. If, however, the present award be substantially reduced, and the appellee be compelled to pay the costs in this court, it is very apparent that there will be practically *nothing* left to it to reward it for said achievement.

We believe that the facts show conclusively that the award was moderate and entirely reasonable under the circumstances existing in this case, and in view of the small value of the property salvaged. No suspicion of personal interest, no pause for negotiation, detract from the immediate response to the call from a vessel in distress, and the willing and protracted efforts to rescue vessel *and crew*, efforts necessarily involving considerable danger, finally crowned with complete success, and later recognized by the award of a commensurately reasonable amount of money for salvage services, constitute a sincere encouragement to that ready, democratic and unselfish spirit of assistance to

vessels in distress, the fostering of which is the basis of the theory and practice of salvage awards.

Dated, Honolulu, T. H.,

October 4, 1916.

Respectfully submitted,

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(ADDENDUM FOLLOWS.)



## ADDENDUM IN REPLY TO APPELLANT'S BRIEF.

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\* As was to be expected, the brief for appellant attempts to minimize the salvage services performed in this case, and, by an ingenious molding of *part* of the evidence, in utter disregard of other parts, to establish negligence on the part of the "Niihau" in not undertaking the second operations sooner. Practically everything that is said is fully and completely answered in the foregoing brief, but a few words may be added.

Counsel for appellant gains little in trying to place the "Halcyon" further off shore than she really was on the first occasion. He detaches certain evidence from the record to establish this, but the *complete* statement of the testimony in our brief will readily enable the court to get at the truth of the matter. He says that, if the "Halcyon" had dragged much, she would have parted her line to the buoy, but he forgets that the line was *400 feet long* (Olson, p. 131) and the buoy was certainly not more than 400 feet from the shore. We also do not know where counsel gets his warrant for referring to the buoys as "flat wooden boxes", which we do not think the record shows, and which (without positive knowledge on the subject) we believe to be incorrect. The danger of fouling the buoys and entangling the "Niihau's" propeller on that dark and tempestuous night was undoubtedly a serious one and it cannot be breezily eliminated by a few well chosen words.

Appellant also attempts to minimize the *very great* danger to the "Niihau's" small boat, because she came



safely out to the steamer on her first trip without a surf line and also made her first trip to the "Halcyon" without such a line. We might remark, in answering this argument, that on the first trip the boat had simply her *regular* crew of five men and was not hampered by carrying a hawser, while, on the initial trip to the "Halcyon" the boat, though not having a regular surf line, *did* have a 4-inch line bent on to the 6-inch hawser, which helped it considerably. Moreover, it was the very danger that the boat was in on the first two trips that made her crew *refuse to go* on subsequent trips without a surf line. The mere fact that the first two trips were made safely, and without loss of life, constitutes no argument that there was no peril, and the imperative demand for a surf line *after the danger had been realized through actual experience* sufficiently shows the true situation.

The main point on which appellant relies, however, is the alleged negligence of the "Niihau" in lying inactive for over two hours while the "Halcyon" was drifting ashore for the second time. Evidence is referred to to substantiate this charge, but the trouble is that the small portion of the testimony which is cited does not fit the facts. The whole argument is based on Capt. Bruhn's *erroneous* testimony that the first line parted at about 6 a. m., which is fully explained in our brief. Claimant's answer in the case only claims a delay of "more than an hour" (Tr. 187). Lacerdo, an absolutely disinterested witness, testifies that the line parted at about *seven* o'clock (Tr. 251). Paulos, the "Niihau's" chief engineer, says it parted at 6:50 or 7 (Tr. 475), and he was pinned down to this evidence by appellant's

own counsel (Tr. 477, 478). Piersen, appellant's own witness, fixes the time at 6:30 or 7 (Tr. 93). Even Olson does not claim that it was before "about half-past six" and he *says* he looked at his watch (Tr. 124-125). It is perfectly clear that Bruhn was mistaken when he said six o'clock instead of seven o'clock, yet it is entirely on this mistake that appellant's flimsy charge of negligence is built.

Appellant also relies on the evidence of Easton that the "Niihau" changed her position by coming closer to the "Halcyon" at about 7:45, the witness saying: "About quarter to eight she came in closer" (Tr. 438). The evidence, as our brief clearly shows, establishes that the "Niihau" made this move as soon as she could after she *noticed* that the "Halcyon" was dragging, and, as both Carlson and Pilot Mosher placed the time of her appreciable dragging in the vicinity of eight o'clock (Tr. 200, 343-344), and, as Olson's marine protest notes that "at 8 a. m. it was seen that the vessel was drifting ashore fast" (Tr. 492) and notes no previous drifting, it may fairly be assumed that the "Niihau" *did* start to shift her position in the neighborhood of eight o'clock, and Easton's evidence may be approximately correct (although his further evidence that it was an hour or an hour and a quarter thereafter before the "Niihau" sent her boat to the "Halcyon" is obviously *not* correct, for appellant admits that the "Halcyon" hoisted her distress signals at 8:35 a. m., and the boat was either then on its way, as the court impliedly finds (Tr. 496) or was despatched immediately afterwards). Capt. Bruhn thinks that the boat was

despatched at about eight o'clock (Tr. 409), showing again his misconception as to the *times* involved, but harmonizing his evidence in other respects with that of the other witnesses.

We have, then, the following situation pretty clearly established: The towing hawser broke at about 7 a. m., and the "Niihan" changed her position about three-quarters of an hour or an hour thereafter, as soon as the "Haleyon" was in fact found to be appreciably drifting. And about half or three-quarters of an hour later the "Niihan's" boat left for the "Haleyon"—surely a short space of time to allow for the shifting, redropping of the anchors, coiling the rope, getting the boat ready, etc., in spite of appellant's caustic criticism of Capt. Bruhn for the time spent by him in "preparing". Such manœuvres in a storm require time, and it is surprising to us that so little time was taken. The learned judge who decided the case, and who is more familiar with conditions in the Hawaiian Islands than any man now living (having been head of the Provisional Government, President of the Republic and first Governor of the Territory), said that "*such preparations might well have occupied an hour and a half or more*" (Tr. 497).

All of the foregoing argument, however, could well be omitted, and it could also well be admitted that the tow-line broke at 6 a. m. and that the "Niihan" was inactive for two hours, in view of the fact that the "Haleyon" *did not want assistance and did not ask for it*. As repeatedly pointed out in our brief, Capt. Bruhn supposed that his line had been cut by the "Haleyon" and

that he had been dismissed. Under the circumstances he would have been justified in leaving her entirely, but instead and in spite of the other engagements of his vessel he remained in the vicinity. Moreover, Capt. Olson had been offered help by Lacerdo's launch, and had not only refused it, but had denied that he was drifting or needed a line and asserted that he was "all right", all of which appears from our brief. Capt. Bruhn can hardly be blamed for not offering what he had every reason to believe Olson would not accept and what Olson *in fact* would not have accepted. Furthermore, if Olson needed help, *why did he not put up distress signals and ask for it?* This point is absolutely ignored in appellant's brief, yet we think it a most important inquiry. All he had to do to get help was to ask for it, and the fact that he *did not* ask for it could only mean that he did not *want* it, as, *in fact*, he did not (as his conversation with the men in Lacerdo's launch shows). And especially was this the inevitable conclusion for Capt. Bruhn to draw, while feeling that his hawser had been cut loose by the "Halcyon".

In view of the foregoing we resent most strongly appellant's assertion that the "Niihau" purposely allowed the "Halcyon" to get into extreme danger before proceeding to her assistance, in order to enhance the value of its services. Such an assertion is unjust and it finds no hint of support in the record. If we cared to be equally censorious we would say that Capt. Olson *wanted to go ashore* to collect insurance or for some other reason (Tr. 253, 266), but we make no such assertion. We submit that no one can read the record in this

case without coming to the conclusion that Capt. Bruhn was actuated by none but the best of motives in the salvage operations, and to suggest otherwise is, to say the least, ungenerous.

Appellant also claims that the "Niuhau" was negligent in allowing her tow-line to part. The cases cited to establish this remarkable contention are in no way in point, for all deal with the breaking or slipping of hawsers without adequate cause therefor, whereas, in the case at bar, the cause of the break was fouling one of the buoys. The line was a *brand new* one (Tr. 71, 308, 338), and there is not a word of evidence in the record to show that it was not a first-class line in every respect. The case is entirely different from that of *The Roberts*, Fed. Case No. 11,914, where the stranded vessel had 1800 tons of stone and iron in her and a 6-inch line was used *after* a 12-inch one had parted. Appellant further suggests, however, that *two* lines should have been used because this was done on the second stranding. This is the converse of appellant's argument that the first boat from the steamer successfully went in without a surf line and, therefore, a surf line was not needed. There was absolutely no reason to believe that the first line would not do the work, and to fasten two lines would have taken considerably more time, as the second salvage operations show. And, as a matter of fact, the first line brought the "Halcyon" out into a place of comparative safety after some *very hard towing*, and it was only *after* it had broken on the buoy that it was considered advisable to use two lines. We think it will be very difficult to predicate a charge of negligence

on any such showing. Finally, it is claimed that it was negligent to allow the line to become foul of any buoys, and that valuable time should have been wasted in carefully fixing their location in order to subsequently avoid them. As shown in our brief, the "Niihau's" hawser was *120 fathoms* long, and there were 65 fathoms, or nearly 400 feet, between the two vessels, and she was towing in the darkness of the night. Under these circumstances, appellant's argument on this point needs no reply. In fact the whole contention as to the hawser is so petty as to suggest the weakness of the whole defense.

Appellant's concluding point is that the award was excessive in any event, and this, in our opinion, presents the only real ground for controversy. If appellant's statements on pages 30 to 34 of the brief were correct, his conclusion would also be correct. The facts, however are not as stated. It is said that the "Halcyon" was originally in *practically no danger*, although she was probably aground and certainly almost aground. It is said that she might have lain in her second position *a week*, although the weight of the evidence is that she would have been wrecked in a few hours, and this is borne out by her utterly unseaworthy condition. It is said that the cargo could have been saved by taking it ashore when the vessel beached or by discharging it into lighters. The court can readily decide what lighters could have done in the prevailing storm, and, while some of the cargo might have gone ashore, we venture the suggestion that lumber washed ashore in scattered quantities, after being immersed for several



hours, would not be a very merchantable article, and that it would hardly pay its owners to salve and haul the same. It is said that the salving vessel was in no danger other than that to which she was subjected *in her regular employment*, and that this was true even of the small boat, a point fully covered in our brief. And, of course, it is also said that the crew of the "Haleyon" were in no danger, although taking them off would have been a most hazardous undertaking, and although Capt. Olson did not dare to go ashore to note his protest until two days later. It is further said that the salvage service occupied only six hours, overlooking the fact that the "Niihau", at Olson's request, remained attached to the "Haleyon" till the morning of January 14th, thus making a service of about twenty-eight hours. Finally, it is suggested that the term of the trial judge was about to expire and that, therefore, he did not give the case careful consideration. We will leave the court to grapple with these weighty contentions as best it can.

Appellant closes his brief with a few carefully selected cases of *very low* salvage awards, and we might remark in passing that authorities can usually be found to either sustain or reverse *any* salvage award, because such cases are legion and depend on varying circumstances. In *The Penobscot*, the services were performed in broad daylight, and only lasted an hour, and the court found that there was no real peril to the salving vessel. In *The Nellie Floyd*, the peril of the salved vessel was not extreme, but we are frank to say that, in our opinion, the amount awarded was far too low. This is also true

of the case of *The Thomas A. Garland*, in which case, also, the value of the salving vessel was about one-fifth of the value of the "Niihau". In *The Ranger*, the services were rendered by a small fishing steamboat, and another vessel also assisted, which did not appear in the case but which presumably would have received a substantial award. In view of these facts the award comes measurably close to the award in the case at bar. *The Hyderabad* is the usual case of towing a disabled vessel at sea, where the awards are naturally less than in cases of stranding. She was not a derelict and the crew simply left her to get other assistance. In *The Thomas L. James*, the salvors were *individuals*, and the court expressly points out that no salving vessel is involved (p. 571). Where salving vessels *are* involved, however, the owners usually get three-fourths of the award because of the use of the vessel, and the individual members of the crew only get *one-fourth*. However, the discussion of salvage awards is generally unprofitable, as each case depends on its own particular circumstances.

We note also that, in most of the cases referred to, misconduct was alleged against the salvors, but in none was the charge sustained. There seems to be something about salvage operations which leads the rescued party to always criticize his rescuer, and in most instances it is probably due to the weakness of human nature. In the case at bar, however, we believe that a clean, disinterested service was rendered and that the record bears this out, making it safe to ignore the citations on pages 22 to 29 of appellant's brief.

We again submit that, having in view the meritorious services rendered and the small value of the salvaged property, the award was just and should be affirmed.

Dated, San Francisco,  
October 21, 1916.

S. H. DERBY,  
*Of Counsel for Appellee.*